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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1933.

No. 787

ILLINOIS COMMERCE COMMISSION, *et al.*,
Appellants,

vs.

THE UNITED STATES OF AMERICA, *et al.*,
Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

BRIEF FOR APPELLANTS.

Nature of the case and the proceedings below.

This is an appeal from a decree of the District Court of the United States, specially constituted pursuant to the provisions of the Urgent Deficiencies Appropriation Act of October-22, 1913, 38 Stat. at L. 208, 219, 220, Chap. 32, Judicial Code, § 238, U. S. C. A. Title 28, § 345, dismissing the bill of complaint filed October 4, 1933, by the Illinois Commerce Commission, Public Service Commission (of Indiana), the Board of Trade of the City of Chicago and Acme Steel Company, in which it was sought to enjoin, set aside, annul, suspend and restrain the enforcement, operation and execution of the order of the Interstate Commerce Commis-

sion, hereinafter referred to as the Commission, entered July 3, 1933, in its Docket 19610, *Switching Rates in the Chicago Switching District*, 195 I. C. C. 89, and to enjoin and restrain the railroad defendants from publishing, charging and collecting rates in alleged compliance with said order and from in any manner changing the rates for intrastate switching between points in the Chicago switching district in the State of Illinois, and in the State of Indiana.

The order complained of (R., 168a) was ostensibly entered by the Commission under the authority conferred upon it by section 13(4) of the Interstate Commerce Act (U. S. C. A. Title 49, section 13), and, after two extensions of its effective date, became effective on November 20, 1933. That order required the respondent carriers "according as they participate in the transportation" to establish and maintain switching rates and charges on an all-commodity basis for switching service in intrastate commerce in the Chicago switching district within the States of Illinois and Indiana which should not be less than the rates contemporaneously applied by "said carriers" to the transportation "by them" of all commodities in interstate switching service between points in the Chicago switching district in the states of Illinois and Indiana. The intrastate switching rates then in effect were 2.5 cents per hundred pounds, minimum 60,000 pounds, when the services of no more than two switching carriers were required, that is, for a one or two-line haul, and 3 cents per hundred pounds, the same minimum, when more than two switching carriers participated in the haul. The interstate rates then in effect on all commodities except railway equipment on its own wheels by approval of the Commission given in *Switching Rates in the Chicago Switching District*, 177 I. C. C. 669, were 3 cents per hundred pounds for a one-line haul, 3.5 cents per

hundred pounds for a two-line haul, and 4 cents per hundred pounds for a three-or-more-line haul. For convenience the report last cited will be hereinafter referred to as the *First Report* and the report (195 I. C. C. 89) on which is predicated the order complained of will be referred to as the *Second Report.*

The appellants were parties to the case before the Commission.

The entire transcript of oral testimony, together with all exhibits, constituting the entire record before the Commission, are offered in evidence in support of the allegations of the bill of complaint.*

The District Court, by final decree, dismissed the bill of complaint. (R., 1316.) The findings of fact and conclusions of law of the lower court appear in the printed record at pages 1307 to 1316, but have not been reported.

Jurisdiction.

Paragraph 1 of Rule 12 has been complied with and this Court entered an order on March 5, 1934, that probable jurisdiction had been shown.

Statement of the case.

The Commission's two reports (R., 33-84 and 137-168b) are the sources of the statements of fact herein made, except as to such facts which it is believed are there inaccurately stated or as to which the reports are silent.

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* Figures following "R." refer to the page of the printed record in this Court; figures following "Tr." refer to the page of the record before the Commission which is there reduced to narrative form.

Proceedings before the Commission leading up to the First Report.

Prior to August 1, 1911, the rates, charges and practices of the carriers covering switching services within the Chicago switching district were in a chaotic condition. Individual tariffs were then published by each carrier naming rates local to its line and based upon its own local conditions. No joint rates were in effect. During 1910 a joint committee was organized, composed of shippers and carriers, with the object of establishing some uniformity in the local switching rates. After many conferences various differences were harmonized and an agreement was entered into, known as the Lowrey agreement (May 2, 1910—R., 533; Tr., 285), which was translated into an all-commodity tariff (hereinafter referred to as the Lowrey tariff) effective August 1, 1911, establishing uniform individual and joint rates on all commodities except coal, coke and grain. At the time of the commencement of these proceedings before the Interstate Commerce Commission, the then effective all-commodity rates in the Lowrey tariff were 2.5 cents for 1-line and 2-line hauls and 3 cents for 3-or-more-line hauls. (R., 40.)

The present proceedings grew out of the Commission's decision in *Jones & Laughlin Steel Corp.* v. *B. & O. R. R. Co.*, 96 I. C. C. 682, decided April 15, 1925, wherein the Commission prescribed a distance scale of reasonable maximum rates on iron and steel articles in carloads from the Pittsburgh group to St. Louis, Missouri, and to certain destinations in Illinois and Indiana, and found the rates on the same articles from points in Illinois and Indiana to the same destinations to be unduly preferential. Subsequently, the carriers attempted to realign the rates on iron and steel articles in Illinois Freight Association Ter-

ritory to conform with the scale of rates prescribed in *Jones & Laughlin Steel Corp.* v. *B. & O. R. R., supra.* The rates proposed were filed to become effective April 25, 1926, but were suspended by the Commission. Thereafter the carriers filed tariffs to become effective April 30, 1927, and on later dates, naming rates of 3, 3.5 and 4 cents to supersede the effective rates of 2.5, 2.5 and 3 cents, respectively, for 1-line, 2-line and 3-or-more-line hauls, for application within the district, such rates to apply not only on iron and steel articles, but on commodities generally except grain, grain screenings, and railway equipment on own wheels, and except livestock via the B. & O. Chicago Terminal Railroad, and similar rates to apply on the same commodities between points in the district on the one hand and Chicago Heights on the other, and to and from points adjacent to the district on carload traffic on which Chicago rates apply. These rates were suspended in *I. & S. Docket 2900, Switching Rates Between Points in Chicago and Chicago Heights Districts.* (R., 36, 38.)

Thereupon (on May 11, 1927—R,. 9), the Commission, on its own motion entered upon the proceeding, known as Docket 19610, of inquiry and investigation into and concerning the lawfulness of all rates and charges for switching within the Chicago switching district of all carload traffic moving in interstate commerce and their relationship to like rates and charges for switching in intrastate commerce, with a view to prescribing such reasonable, proper, non-discriminatory, non-prejudicial, and otherwise lawful switching rates for said traffic as the facts and circumstances might appear to warrant. I. & S. Docket 2900 was consolidated with Docket 19610. (R., 36-38.)

At the time the carriers filed the interstate schedules suspended in I. & S. Docket 2900, they also filed with the Illinois Commerce Commission similar schedules applicable

on intrastate traffic within the State of Illinois, and similar schedules with the Public Service Commission of Indiana, applicable on intrastate traffic within the State of Indiana, which said schedules were suspended by both the Illinois and Indiana Commissions. (R., 12, 13.)

Illinois Commerce Commission Dockets 17513, 17250 and 17269, and Public Service Commission of Indiana Cause No. 8939, involving these suspended intrastate rates, were heard with the general investigation. (R., 39.)

The only rates, however, in issue before either the Indiana or Illinois Commissions were those named in tariffs filed with them and by them suspended.

The only issue before the Illinois Commerce Commission was the question of the reasonableness of the proposed Lowrey rates, as stated in the tariffs which were suspended by the Illinois Commission. No general investigation of rates was instituted by the Illinois Commission, and during the pendency of these proceedings no petition was filed invoking the judgment of the Illinois Commission on any other of the switching rates in the Chicago district. (R., 332, 1091; Tr., 2844.) The same situation was true with respect to the Indiana Commission. (R., 1118; Tr., 2931.)

By order dated May 25, 1927, the Interstate Commerce Commission, in Docket 19610, required the carriers to submit at a hearing to be held in Chicago in November, 1927, a statement or statements showing the cost of switching carload traffic within the Chicago switching district, and pursuant to this order the defendant railroads made the cost study (R., 475; Tr., 107-108) of which more will be said later.

At the conclusion of extensive hearings, the Commission entered its findings and order on July 31, 1931, in the *First*

Report. (R., 33 to 84.) In that *First Report* the carriers were authorized to increase their interstate switching rates effective November 10, 1931, (the effective date later extended to December 10, 1931), to 3, 3.5 and 4 cents per hundred pounds for 1, 2 and 3-or-more-line hauls, respectively, all rates being subject to a minimum of 60,000 pounds per carload, which said rates the Commission in its finding stated would not be unreasonable for future application on all of the commodities switched within the district except railway equipment on its own wheels. (R., 76.)

On August 26, 1931, the Illinois Commerce Commission entered its order in Dockets 17250, 17269 and 17513, dismissing the complaints and canceling the suspended Lowrey tariffs (R., 335-340), and in its findings said (R., 333):

> "The burden of proving that the increased charges proposed are just, reasonable and lawful is upon the respondent carriers. Carriers depend upon the cost study as their sole justification for the proposed increases in switching rates. The record is entirely lacking in traffic evidence upon which the Commission could find that the proposed rates are justified."

and also made the following specific findings (R., 334):

> "The Commission having considered the evidence both oral and documentary and statements of counsel and being fully advised in the premises is of the opinion and finds:
>
> (1) That the traffic included in the cost study moving over certain railroads selected by the carriers is not representative of the intra-district traffic as a whole;
>
> (2) That even approximate costs of handling the study cars cannot be determined from the present record;
>
> (3) That the record is entirely silent as to the costs of handling the 'other' cars not included in the study;
>
> (4) That the record does not contain sufficient evidence to determine the proper amount to be allowed for taxes and return on investment;

(5) That the proposed changes in rates involved in these proceedings have not been justified."

On August 26, 1931, the Public Service Commission of Indiana made an order requiring the carriers to permanently cancel said schedules under suspension before it and made findings identical with those of the Illinois Commerce Commission. (R., 414-416.)

Proceedings before the Commission in connection with the Second Report.

Thereafter, on September 10, 1931, the carriers filed a motion with the Interstate Commerce Commission for an order requiring them to establish on intrastate traffic the same rates as the increased rates which had been approved for interstate traffic. That motion was denied. (R., 9-10, 433.)

On November 2, 1931, the Commission reopened Docket 19610 for further hearing, with respect to the relation of rates and charges for switching in intrastate commerce and the rates prescribed for like switching in interstate commerce, for the purpose of determining whether the adjustment between the intrastate and interstate rates was unduly prejudicial (1) to interstate shippers and traffic, and unjustly preferential of intrastate shippers and traffic, or (2) unjustly discriminatory against interstate commerce in violation of section 13 of the Interstate Commerce Act, with a view to the entry of such order as might be necessary to correct any violation of law that might be found to exist. (R., 139.) That order did not provide for the receipt of evidence as to the reasonableness of the rates involved or as to the propriety of predicating the rates to be prescribed on a cost study based on 1927 costs as applied to 1926 traffic. Consequently, the appellants, prior to the further hearing, filed with the Commission identical mo-

tions under dates of January 28, February 3 and February 18, 1932, asking that the Commission require the respondent carriers to conduct a new and representative cost study, under the supervision of the Commission, for the purpose of determining 1932 costs. It was alleged as ground therefor that evidence as to 1927 costs as applied to 1926 traffic did not provide a representative showing as to present-day costs. By stipulation filed with the Clerk of this Court a certified copy of one of these motions and the stipulation are printed as "Appendix B" to this brief. All three of these motions were denied February 8 and March 14, 1932.

On December 28, 1931, complaint was filed with the Commission, Docket 24950, by the Acme Steel Company and 57 other shippers and receivers of freight switched between points within the Chicago switching district, alleging that the interstate switching rates which became effective on December 10, 1931, were unjust and unreasonable. The carriers moved for the dismissal of this complaint without a hearing. That motion was denied and the two cases, *i. e.*, the reopened Docket 19610 and the formal Docket 24950, were set for hearing before Examiners Faul and Wilbur at Chicago. While the records in the two cases were separately kept, it was stipulated that any material or relevant testimony of record in either case should be considered as part of the record in the other case. (R., 139.)

Separate briefs were filed in each case but a single proposed report (R., 85 to 135) was issued by Examiners Faul and Wilbur of the Commission, recommending that the Commission find that no unjust discrimination against interstate shippers or localities and no undue preference of intrastate shippers or localities was shown, and that no unjust discrimination against interstate commerce had been shown. These two Examiners personally heard all the tes-

timony in the proceeding, and therefore the recommendation which they made is entitled to great weight. Their joint proposed report also recommended dismissal of the complaint against the interstate rates. (R., 135.)

Exceptions were filed to the proposed report and the cases were orally argued. On July 3, 1933, the Commission issued its *Second Report* and order (195 I. C. C. 89) (R., 137 to 168b) sustaining the proposed report of the Examiners, in so far as lack of discrimination and preference as between individuals and localities is concerned, but finding unjust discrimination against interstate commerce was occasioned by reason of the difference in rates. The decision of the Commission was not unanimous; Chairman Farrell and Commissioner Aitchison dissented on the ground that the difference between the intrastate rates and the interstate rates was justified by the difference in service performed in intrastate commerce and in interstate commerce. (R., 167.)

A joint petition was filed with the Interstate Commerce Commission on August 15, 1933, by appellants herein seeking a reopening for further hearing, for the setting aside of the order of July 3, 1933, and for reargument and/or reconsideration. Appendix D to the bill is a copy of that petition. (R., 169 to 236.) In that petition it was alleged in some detail that the conditions surrounding the handling of switching traffic in the District had substantially changed in the seven years which had elapsed since the cars were transported which served as a basis for the cost study. On September 9, 1933, the Commission postponed the effective date of its order from September 20, 1933, to October 20, 1933, during which period of time the Commission considered the petition for reopening and a petition for suspension of the tariffs. Both petitions were denied on October 4, 1933.

What now follows consists of a summary of the evidence before the Commission which is material in considering the points made in the argument.

EVIDENCE CONSIDERED IN THE *FIRST REPORT* BEARING UPON THE REASONABLENESS OF RATES.

The carriers' cost study.

As appears from the *First Report* of the Commission (R., 33-84), the only evidence presented by the carriers directed to the reasonableness of the increased rates proposed was a cost study which the Commission described at some length. (R., 41-56.)

The facts shown by, or relating to, that cost study and the evidence introduced in connection therewith which are material in the consideration of the questions involved in this case are as follows:

The Commission states that there are 35 railroads operating in the Chicago switching district in Illinois and Indiana. (R., 39.) An inspection of the maps of the switching district made a part of the record shows the extent of the district as it is defined in the *First Report*. (R., 76.) For the convenience of the Court we have reproduced as an Appendix hereto Exhibit 25, which is one of the maps referred to.

The railroads which were parties to the case before the Commission ranged from short, exclusively switching roads, such as the Illinois Northern; the Chicago & Calumet River; Chicago, West Pullman & Southern; and Pullman Railroad, each of which are but a few miles in length, to the Chicago, Milwaukee, St. Paul & Pacific; Pennsylvania; Chicago & North Western; New York Central; Chicago, Rock Island & Pacific, and Atchison, Topeka & Santa Fe, each of which are several thousand miles in length. The

territory embraced by the Commission's decision is, as the Commission found in its first decision (R., 39), approximately 40 miles in length and from 7 to 15 miles wide, comprising some 600 square miles.

Of the 35 railroads operating within the Chicago switching district, only the following eight perform any one-line interstate switching service (Ex. 6):

Baltimore & Ohio Chicago Terminal Railroad,
Chicago & Erie Railroad,
Elgin, Joliet & Eastern Railroad,
Indiana Harbor Belt Railroad,
Michigan Central Railroad,
New York Central Railroad,
New York, Chicago & St. Louis Railroad,
Pennsylvania Railroad.

None of the following 20 railroads operates in any portion of the Chicago switching district outside of the State of Illinois (Ex., 6):

Alton Railroad,
Atchison, Topeka & Santa Fe Railroad,
Belt Railway of Chicago,
Chicago & Calumet River Railroad,
Chicago & Illinois Western Railroad,
Chicago & North Western Railway,
Chicago, Aurora & Elgin Railroad,
Chicago, Burlington & Quincy Railroad,
Chicago Great Western Railroad,
Chicago Junction Railway,
Chicago, Milwaukee, St. Paul & Pacific Railroad,
Chicago River & Indiana Railroad,
Chicago, Rock Island & Pacific Railroad,
Chicago Short Line Railway,
Chicago, West Pullman & Southern Railroad,
Illinois Central Railroad,
Illinois Northern Railway,
Manufacturers Junction Railway,
Minneapolis, St. Paul & Sault Ste. Marie Railway,
Pullman Railroad,

while the following 7 railroads have mileage in both Illinois and Indiana in the Chicago switching district (Ex., 6):

Baltimore & Ohio Railroad,
Chesapeake & Ohio Railroad,
Chicago & Eastern Illinois,
Chicago & Western Indiana,
Chicago, South Shore & South Bend Railroad,
Grand Trunk Western,
Wabash Railway,

None of them publishes any 1-line interstate switching rates or performs any 1-line interstate switching service, that service being performed by a subsidiary company owned either wholly or in part by an affiliated company or by a lessee company, all of which operating companies are included in the eight railroads first above named.

Of the 35 railroads above named, only 8 publish interstate 1-line switching rates and engage in 1-line interstate switching service. There is no 2-line interstate switching service performed jointly by any two of the twenty carriers named in the second list of carriers, nor is there any 3-line interstate movement performed jointly by any three or more of the twenty carriers named in the second list. There are 1-line intrastate Illinois, 2-line intrastate Illinois and 3-line intrastate Illinois switching rates and movements over the lines of all the twenty carriers named in the second list.

As a starting point for their cost study the carriers within the district in the month of September, 1926, accumulated data as to the origin and destination of 42,666 cars handled in both state and interstate commerce within the district in switching service. A summary of the statistics accumulated for these cars as divided into 69 commodity groups, as divided into 1, 2 and 3-line hauls, and as further divided between state and interstate traffic is shown in Exhibit 11-A. This exhibit shows the number of miles each group of cars was transported, and on it are based computations

subsequently shown herein as to the average lengths of haul.

No statistics were accumulated by the carriers as to the actual cost of handling the cars embraced in this analysis, which is heretofore referred to as the 1926 traffic count.

Subsequently, in 1927, only 15 out of the 35 carriers within the district made a study as to the switching costs incurred in the handling of traffic for a single week, the 15 carriers embraced in this study, as named by the Commission, being the following (R., 41):

Trunk Lines.

Chicago, Burlington & Quincy Railroad,
Chicago & North Western Railway,
Chicago, Milwaukee, St. Paul & Pacific Railroad,
Chicago, Rock Island & Pacific Railway,
Elgin, Joliet & Eastern Railway,
Illinois Central Railroad,
Pennsylvania Railroad.

Switching and Terminal Companies.

Baltimore & Ohio Chicago Terminal Railroad,
Belt Railway of Chicago,
Indiana Harbor Belt Railroad,
Chicago & Illinois Western Railroad,
Chicago Short Line Railway,
Chicago, West Pullman & Southern Railroad,
Illinois Northern Railway,
Pullman Railroad.

The Commission at no time directed that any particular carrier be included in the cost study (R., 802; Tr., 1385), but it did deny the request of counsel for shippers that certain carriers be included in the study; Commissioner Campbell at the first hearing advised the carriers that it was their responsibility to make a representative study.

For various carriers the single week in which this study

was made ranged from the third week in June to the third week in October, 1927.

As described by the Commission, the method of this cost study was as follows (R., 41-2):

> "The study covers carload movements only, and segregates the expenses incurred thereon into three general classes, namely, clerical, switching, and car detention or maintenance. Taxes and return on investment are provided for by the employment of an estimated ratio, referred to as an operating ratio and used as a divisor to expand the determined costs so as to embrace those elements.
>
> *Clerical.* This expense represents the cost incurred to prepare records at the point of origin and destination. It embraces the direct expense as well as an apportioned amount of superintendence, maintenance, and general expenses. The total clerical cost at each terminal is reduced to a unit cost per consignment which is assigned to each car moving in or out of the respective terminal.
>
> *Switching.* This expense, concisely, is the cost of all services required in the physical movement of a car, inclusive of an apportioned amount of superintendence, maintenance, traffic, and general expense. The total switching expense is reduced to an engine-hour basis and ultimately to the cost per unit of production, the denominator being the number of cars handled in an hour by an engine while performing a distinctive part of the whole movement. These distinctive parts make up the switching service as a whole, and are designated 'elements of service.' All cars moving over a certain route normally receive the same elements of service peculiar to that route. The total cost per car of all elements of service embraced in a given route are combined under an index number. The respective index cost is then assigned to each car moving over the same route.
>
> *Car detention.* This expense embraces the maintenance of freight-train cars inclusive of an apportioned amount of superintendence, maintenance, and general expenses. The total car-detention expense is reduced

to the cost per serviceable-car day, which is applied to each car for every day that it is in switching service.

Operating ratio. The cost study formula uses an operating ratio of 66.67 per cent, which approximates the ratio of 67.4 said by the carirers to be necessary for the railroads of the country to earn 5.75 per cent upon their investments as a whole. The carriers herein contend for a ratio lower than 66.67 per cent, whereas the shippers contend for a higher ratio.

While the above formula has been the basis of cost studies presented in previous switching cases, its application in these proceedings apparently is the most elaborate and comprehensive to date. The study was extended to each one of the 69 commodity classes for one, two, and three line hauls segregated between interstate, intrastate Illinois, and intrastate Indiana. The test periods within which the unit costs were determined were confined to one week on each of the 15 roads during June, August, and October, 1927. The unit costs so determined were then applied to 26,166 cars, or 61.33 per cent of those embraced in the traffic analysis as of September, 1926, this number having moved wholly over the study roads during that month. These cars are hereinafter referred to as study cars in contradistinction to those not included in the study, and which are designated as nonstudy cars."

The elements of cost computed in accordance with the foregoing, of which the details are shown in Exhibits 1 to 8, inclusive; and 90 and 91, were stated as averages and were assumed to attach to both state and interstate traffic. No attempt was made to determine either direct or indirect costs on the cars handled during the study weeks in interstate commerce separately from those which attached to the cars handled in intrastate commerce. In fact, cost figures were *not* computed for the completed movements of *any* of the cars which moved in the week of 1927 on which the cost figures were based. Rather, as the Commission states, the elements of cost developed in 1927 were applied to a portion only of the cars embraced within the 1926 traffic count, the

cars to which such cost elements were applied being referred to as "study cars" and the remainder as "nonstudy cars."

The table on page 679 of the First Report (R., 43) shows the total number of cars in the 1926 traffic count as divided between study and non-study cars. From the data there shown we have constructed the following table in which, for Illinois intrastate, Indiana intrastate, and the interstate cars separately considered, is shown the proportion which the study cars and non-study cars were of the total of each separate class of traffic:

	Number of Cars			Percent of Total	
	Study	Non-Study	Total	Study	Non-Study
One-Line Hauls.					
Intrastate Illinois	1,951	7,017	8,968	22	78
Intrastate Indiana	2,426	134	2,560	95	5
Interstate	7,573	595	8,168	93	7
Total	11,950	7,746	19,696	60	40
Two-Line Hauls.					
Intrastate Illinois	5,853	4,257	10,110	58	42
Intrastate Indiana	158	11	169	94	6
Interstate	5,472	1,958	7,430	74	26
Total	11,483	6,226	17,709	65	35
Three-Line Hauls.					
Intrastate Illinois	1,930	1,735	3,665	53	47
Intrastate Indiana	....	....	....	..	..
Interstate	803	793	1,596	50	50
Total	2,733	2,528	5,261	52	48

COMPOSITE—1-, 2- AND 3-LINE HAULS.

Intrastate Illinois	9,734	13,009	22,743	43	57
Intrastate Indiana	2,584	145	2,729	95	5
Interstate	13,848	3,346	17,194	81	19
Total	26,166	16,500	42,666	61	39

By applying the 1927 cost elements to the study cars as separated between 1-, 2- and 3-line hauls, aggregate costs were secured which, when divided by the weight of the tonnage embraced within the study cars as divided between 1, 2 and 3-line hauls, resulted in an average claimed cost per hundred pounds.

The table on page 682 of the *First Report* (R., 46) shows that by the method just described the carriers computed claimed costs, including taxes and return on investment, per hundred pounds as follows: 2.90 cents for 1-line hauls; 3.56 cents for 2-line hauls, and 4.30 cents for 3-line hauls. As stated, these were the average costs claimed on the combined state and interstate cars included within the study. A table on page 679 of the *First Report* (R., 43) shows separately for intrastate and interstate traffic as well as separately for 1-, 2- and 3-line hauls, the per cent of the 1926 traffic count cars which were included within the study.

The protesting shippers before the Commission raised numerous objections to the formula of the cost study and the data on which it was based, a limited number of which were commented upon by the Commission in its *First Report.*

One criticism was as to the inflation of average costs which resulted from the application of higher elements of service costs, developed on movements of relatively low volume during the test period, to similar movements of greater vol-

ume during September, 1926. Since the costs developed under the heading "Switching Costs" are based on an engine-hour cost which is then reduced to a per car basis by dividing by the number of cars handled per hour, the volume of traffic is of controlling importance.

That the traffic conditions in the 1927 week, in which the cost figures were compiled, were not the same as in September, 1926, which was the month in which the cars moved to which the cost data was applied, is illustrated by the following: For industrial switching at the Albert Schwill plant the cost was based on the handling of four loaded cars in the week ending October 25, 1927. That cost was applied to 85 cars which were actually handled in September, 1926, at an average of approximately 20 per week. (R., 495; Tr., 176.) Cost Element No. 346 for the Indiana Harbor Belt was based on nine cars handled during the test week in August, 1927, and the cost was applied to 133 cars moving in 1926 at the average rate of approximately 30 per week. There are numerous illustrations of this situation. (R., 495; Tr., 177.)

Another criticism related to the inflation of cost elements shown for the industry switching at the plants of the various shippers. The engine-hour costs computed by the carriers included, among other things, the costs of maintaining the carriers' property and general expenses, and these costs were allocated to the services performed in proportion to time required to perform each element of service. (Ex. 5.) Page 41 of Exhibit 13 shows that 40 per cent of the total switching costs is for industry switching and like elements of service, all of which are performed on property and tracks at the shippers' plants. Most of such property and tracks is owned and maintained by the shippers themselves. (R., 494; Tr., 175.) Examples of very substantial invest-

ments in and costs of maintaining track facilities are shown for the Youngstown Sheet & Tube Company (R., 549; Tr., 346), the By-Products Coke Company (R. 559-60; Tr. 389; R. 1275, Tr. 212), the Corn Products Refining Company (R., 661; Tr., 843), the Standard Oil Company (R., 1215; Tr., 18), the Inland Steel Company (R., 1224; Tr., 45), the Acme Steel Company (R., 1271; Tr., 198), and the Illinois Brick Company (R., 1282; Tr., 237).

In the light of the above facts the method of the cost study resulted in bringing into total costs, through the channel of engine hour costs as applied to industrial switching, an alleged maintenance cost when no maintenance cost was in fact being incurred.

Another criticism of the cost study relates to the matter of car detention, by which is meant the cost to the carrier of repairing and maintainng cars used in switching service.

In the *First Report* the Commission described the method by which costs were determined for the furnishing of cars used in switching service (R., 46-7) as follows:

> "As to car detention which embraces the combined expenses of car repairs, depreciation, and retirements, the parties admitted that there has been no precise or even satisfactory basis yet developed for allocating that expense to particular services.
>
> The car-maintenance expenses are not segregated in the carriers' accounts between road service and yard service, and there are no means of arriving at the amount of these expenses chargeable to a particular service, such as that here involved except upon the basis of an estimate. The carriers' method of estimating these expenses, which rests upon definitely ascertainable facts, is to divide the total amount of the car-maintenance expenses on the entire road during the year by the total serviceable-car days of the cars in all services, to obtain an average car-maintenance expense per serviceable-

car day, which is then applied to the number of days the cars are detained in intradistrict switching service, as the basis for arriving at the amount of the maintenance expense chargeable to the cars in that service. This is a strictly time factor."

The cost per car day for detention was 64.352 cents. (R., 48.)

Exhibit No. 3 shows the method by which this per car day cost was arrived at. In the first place, it is based solely upon system costs for the year 1926 of the following nine trunk line carriers:

Chicago and North Western
Chicago, Milwaukee, St. Paul & Pacific
Chicago, Burlington & Quincy
Chicago, Rock Island & Pacific
Baltimore & Ohio
New York Central
Pennsylvania
Elgin, Joliet & Eastern
Illinois Central

From the annual reports of these nine trunk lines it was determined that in the aggregate there were 309,947,015 serviceable freight car days for which the carriers had expended in repairs, depreciation, retirements and certain overhead items, $199,457,002, thus producing an average of 64.352 cents per serviceable car day. Repairs alone averaged 45.352 cents per serviceable car day and depreciation averaged 11.866 cents per day. (Ex. 3.)

Two of the nine trunk line roads were not included in the cost study. No figures were obtained for car detention costs on any of the eight exclusively switching roads embraced in the cost study.

Page 45 of Exhibit No. 13 shows the average detention of cars was 1-line hauls 6.60 days; 2-line hauls 7.55 days; 3-line 8.70 days, resulting respectively at the rate of 64.352

cents per car per day in $4.24, $4.86 and $5.60 as the cost for each haul shown for car detention.

No allowance whatever was made for demurrage charged and collected from the shipper for delay in loading and unloading cars in switching service beyond the free time allowed for such loading or unloading. Exhibit 97 shows that the average car haul under load for the 1-line movements, study and non-study roads, was 10.53 miles; for the 2-line movements was 21.12 miles, and for the 3-line hauls was 26.01 miles; allowing an equal haul for the empty car to be returned over the entire length of the loaded distance would produce a total movement loaded and empty 1-line of 21.06 miles; 2-line 42.24 miles, and 3-line 52.02 miles. (Exs. 3 and 120.) Based on the average number of days of car detention the average number of miles that these cars moved per day were, 3 miles for 1-line hauls; 5.5 miles for 2-line hauls, and 6 miles for 3-line hauls. The average car mileage per day for the 9 trunk line roads used in computing the per car per day car detention cost in 1926 was 32 miles. (Exs. 3 and 120.) Thus, under the method used by the carriers which prorated costs entirely on a *time* basis, we find the same cost per car day is charged for switching 3 miles on a single line as is charged for the system use in all service of the 9 roads for 32 miles.

Mr. E. F. Rummell testified for the carriers that damage to freight train cars occurs in all services. More cars are damaged in classification service than in transfer service, but most of the smaller damages occur in classification yards. (R., 890; Tr., 1677.) In the movement from an outer yard to a downtown yard in the Chicago switching district the air is coupled up, and that is practically the same sort of movement as a road-haul movement and the resulting damage to the cars in that movement is practically the same as in a road-haul movement. (R., 890-1; Tr., 1679.)

The Commission found in *Switching at Little Rock,* 140 I. C. C. 583, page 586-7:

> "The car-maintenance costs included in the study embraced only the repair costs occasioned by damage to the cars while being switched in the terminal, as the cars themselves were furnished by the connecting lines. They were determined in the following manner: The extent of damage to cars from switching in the terminal was based on inspection of the cars when they came into and went out of the terminal, and the cost of making the necessary repairs was based on the American Railway Association rules and rates; the total cost thus found, $11,871.04, was divided by the total of car-detention days in the terminal, 51,541, resulting in an average car-maintenance cost per car-day of $0.230323, which was applied to the number of days the cars spent in the terminal in each class of switching service, and the resulting amount divided by the number of loaded cars involved in that service to arrive at the average cost per car.
>
> * * * * * *
>
> This method of arriving at the car-maintenance charge is unsound in principle, inasmuch as the repairs are not necessarily the result of the length of time the car spends in the terminal but of the damage done to the car while being switched. Ordinarily the principal damage to a car in the terminal is in classification service, but in this case no charge was made against that service for car maintenance, presumably because the amount of time involved was small."

The Commission in the instant case, notwithstanding its previous holding that the method of determining damage to cars on the *time* basis was unsound in principle, and that repairs are not necessarily the result of the length of time the cars spend in the terminal, but of the damage done to a car while being switched, and that ordinarily the principal damage to a car in the terminal is in classification service, accepted the *time basis alone* in the instant case. Certainly the more equitable way of approximating the average car

repairs would have been by dividing the total cost of such repairs in the Chicago switching district due to service in the district by the total number of cars handled, thus giving the average cost per car loaded or empty. The method followed in the instant case of taking the system average of the nine trunk lines, with their thousands of miles of operation, and ignoring the experience of the roads exclusively operating in the Chicago switching district cannot be accepted as any evidence of cost on which to determine the reasonableness of rates.

Another criticism related to the operating ratio used by the carriers for the purpose of bringing the costs resulting from the study up to a point which it was claimed would reflect an amount sufficient to provide for a return on investment and for taxes. In order to obtain the total costs hereinbefore mentioned, as shown on page 682 of the Commission's *First Report* (R., 46), it was necessary for the carriers to apply an operating ratio of 66.67 per cent. The evidence of the carriers as to the propriety of using that operating ratio was based on an average for all railroad systems in the United States. (R., 1104; Tr., 2889.)

Obviously the switching service performed within the Chicago switching district is an infinitesimal amount of the whole traffic handled by the trunk lines operating in and out of Chicago. There are, however, within the district a number of carriers who are engaged exclusively in switching service within that district, these including the cost study roads above named under the heading "Switching and terminal companies."

Items 15 and 16 of page 24 of Exhibit 120 show that, for the railroads in the district engaged exclusively in switching service, the average net railway operating income for the seven years ending December 31, 1931, produced a re-

turn of 7.89 per cent. (R., 1254; Tr., 139.) This indicates that, for the roads engaged exclusively in switching service, rates as in effect prior to any of the increases produced more than a "fair return." As to the operating ratio claimed by the carriers the Commission on page 685 of its *First Report* (R., 49-50) found:

> "The evidence is far from convincing in regard to the operating ratio required to expand the operating costs so as to embrace taxes and return on investment. The carriers' study is vague in this respect. They fail to name any definite figure which would bear a distinct relationship to the carriers and the particular traffic under consideration."

And again on page 691 (R., 55):

> "The record herein contains no convincing evidence as to what may be a proper operating ratio for this intradistrict traffic."

In the tables on pages 688 and 690 of the *First Report* (R., 52 and 54), the Commission purports to compare the average costs developed by the carriers with the average revenue yielded by the rates then in effect. The table on page 688 indicates, however, that the average revenue was computed not for the cars embraced within the study but for the study and nonstudy cars combined.

The effect of this was to show a lower revenue than if like had been compared with like, that is, if revenue on study cars had been compared with costs on study cars, since, as is shown by Exhibit 97, the existing rates produced an average revenue of 52 cents per ton (2.6 cents per hundred pounds) on the study cars and only 26 cents per ton (1.3 cents per hundred pounds) for the nonstudy cars. The result of combining study with nonstudy cars is to show a present revenue of 42 cents per ton (2.1 cents per hundred pounds). When it comes to costs however, the Commission confined itself exclusively to the study cars.

Based on revenues so determined, reduced by the exclusion therefrom of the high revenue movements on the false assumption that those represented the E. J. & E. and that the E. J. & E. costs were no different from the average costs, the table on page 690 of the *First Report* (R. 54) would show that for 1-line hauls the ratio of operating expense to weighted average revenue, which is the operating ratio, was 93.14 per cent, and as to this the Commission finds, (R. 54):

> "It is quite evident from the high ratios of operating expenses to the revenues that the present rates are too low."

There is not, however, in the record, any evidence that the operating expense on the non-study cars (which were included within this comparison on the revenue side) is the same as the operating expense of the study cars which alone was used in determining the operating expense with which the revenues were compared.

This matter is covered in detail in the testimony of Witness Tholin on behalf of the Illinois Commerce Commission. (R., 1105-8; Tr., 2892-8.)

A further criticism of the study that the traffic handled by the 15 roads embraced within the study was not representative of the average traffic for the district as a whole.

Among the roads included in the study was the Elgin, Joliet & Eastern. In the September, 1926, traffic count there were included a total of 19,696 cars handled for a 1-line haul, of which, however, only 11,950 were study cars to which cost elements were applied. (R. 43.) Of this latter number 7,093 cars were handled by the E. J. & E., of which 6,854, or 57 per cent of the total 1-line cars in the study, actually moved outside of the district, leaving only 239 E. J. & E. cars wholly within the district. (R., 1099; Tr., 2873-

4.) As contrasted with the fact just stated, the Chicago Junction Railroad was not included within the cost study. The traffic count of September, 1926, showed, however, that there were 1,788 1-line hauls wholly within the district on that carrier and that the Chicago Junction handled a greater number of cars in 1-line hauls than any carrier other than the Elgin, Joliet & Eastern and the Indiana Harbor Belt. (Ex. 13.)

While the Chicago Junction cars were excluded, the carriers did include the Chicago, Burlington & Quincy, although only 30 cars moved in a 1-line haul, and the Chicago and North Western, although only 40 cars moved in a 1-line haul. (R., 1094; Tr., 2869.)

Exhibit 97 shows that for both 1-, 2- and 3-line hauls the average distance transported of the study cars was in excess of the average distance of the nonstudy cars. The greatest disparity is shown on page 1 in connection with the 1-line hauls, where it is shown that the average distance of haul for the study cars was 13.19 miles and for the cars embraced within the traffic count, but excluded from the cost study, was 6.45 miles.

These and numerous other criticisms of the cost study shown of record were sufficient to convince the Illinois and Indiana Commissions that the carriers had failed to justify the proposed increases on intrastate traffic. The Interstate Commerce Commission itself, at page 705 of its *First Report* (R., 69) said:

> "We can not, however, accept the cost study as a definite yardstick by which alone to measure the reasonableness of the rates under consideration, but in addition must apply other tests to determine their reasonableness."

Comparison with other rates.

The evidence offered in support of the reasonableness of the proposed increased rates being confined exclusively to the cost study, the record itself afforded no other basis for a finding as to the reasonableness of the rates assailed. Therefore the Commission was forced to go out of the record and the extent to which it did so is indicated by the following excerpts from the *First Report* which follow immediately after the sentence last above quoted (R., 69-70):

"In *Switching at St. Louis and East St. Louis, supra.* division 3, at page 220, we said: 'A cost study is ordinarily little more than a very rough indication, and, even if unusually comprehensive and exact, it should not be the sole basis for fixing rates.' The hauls involved range from a minimum of 0.1 mile to a maximum of 61.1 miles, with one haul shown to be 89.54 miles. The average hauls for all intradistrict switching are 10.8 miles for 1-line, 21.6 miles for 2-line, 24.5 miles for 3-line, and 18 miles for one, two and three line hauls, combined. These hauls although made with a switch engine are of such great average lengths as to suggest that they are, in effect, line hauls, and except for the fact that they are performed wholly within a district of such unusual size as the Chicago switching district they would be subject to the usual line-haul rates for such distances. In view of this, and the fact that the record contains no evidence to indicate that it costs less to handle traffic by switch engine than by road engine for road hauls of similar distances, it will be enlightening to compare the rates under suspension with line-haul rates prescribed for low-grade commodities for similar average loads and distances.

In the *Southwestern Brick Cases*, 107 I. C. C. 681, we prescribed a distance scale of maximum reasonable carload rates on brick and related articles for application in the Southwest, the single-line scale commencing with a rate of 4.5 cents for hauls of 10 miles and under, with 1 cent added for joint-line hauls.

In No. 17000, Part 11, *Sand, Gravel, Crushed Stone and Shells*, 155 I. C. C. 247, we prescribed a distance

scale of rates for application on sand, gravel, crushed stone, etc., in straight or mixed carloads, between points in Arkansas, Louisiana, and Texas, and western Louisiana. For 10 miles and under rates of 2.5 cents for single-line and 3.25 cents for joint-line hauls were prescribed. Somewhat higher rates were found reasonable for application between points in Arkansas, Oklahoma, and Texas and east-bank crossings in Louisiana.

In No. 17000, Part 6, the *Iron and Steel Investigation*, 155 I. C. C. 517, the scale of rates prescribed for application throughout official territory on a large list of iron and steel articles commenced with 6 cents for 5 miles and under, and for the 15 to 20 mile block, representing the average hauls within the Chicago district, a rate of 8 cents was prescribed. This, and numerous other similar comparisons which could be shown, covering rates prescribed on various low-grade commodities for short hauls, indicates that the rates under suspension are considerably lower than the rates prescribed by us for similar distances in line-haul movements."

There is no evidence in the record which even touches upon such cases or upon the question of whether or not the circumstances and conditions surrounding the transportation to which are applied the line-haul rates prescribed by the Commission in the cases cited in the above excerpt from the *First Report*, are similar or comparable to the circumstances and conditions surrounding the traffic, either intrastate or interstate, handled on switching rates within the district. Although the Commission stated that "the record contains no evidence to indicate that it costs less to handle traffic by switch engine than by road engine for road hauls of similar distances" the fact is that there is substantial evidence of record on the point that switching service is not comparable with road haul service.

F. E. Webster, general freight agent of the Chicago & Eastern Illinois Railroad and in its traffic department over

twenty years, testified (R., 579; Tr., 481) that commercially, road-haul rates cannot be related to switching rates, nor can switching rates be related to road-haul rates.

R. I. Pierce, secretary and traffic manager of the Manufacturers Association of Chicago Heights, and engaged in railroad, industrial and commercial work for the past 21 years, testified (R., 589; Tr., 530-6) that the distinction between line-haul movement and a strictly switching movement, is that the latter is a general movement of cars under switching rates made by a switching or terminal crew, under the jurisdiction of a yard master, which is not true as to a road-haul movement.

F. H. Rutherford, Superintendent of Chicago terminals for the Chicago & Eastern Illinois Railroad, and having been in charge of terminal work for about 20 years, testified that a road-haul movement for a short point involves a lack of tonnage from the time the car is set out to the destination of the train. A road-haul crew moves from one terminal to another. A switching crew always goes back to its own terminal. "It never gets very far away." His distinction between switching and road-haul service is that in the switching service the crew starts out and performs its work and comes back to the starting point, while in road-haul services the crew goes to the nearest division point, stops, and perhaps comes back the next day. Stating it another way, switching services can only extend so far that the crew may start out, go to their limit and still have time to get back to the starting point within their eight hour trip. (R., 591; Tr., 546-549.)

Road-haul crews handle switching at the smaller stations under switching rates that may apply as between two industries at that station, or something of that sort. Such switching is usually handled with the local road-haul crew and is quite a different service from the through train

service. There are two classes of road-haul crews; one is the local crew, with districts usually short, running from 40 to 75 miles, paid by the day or by the hour. Through road-haul train crews are paid by the mile and their business is to haul trains from one terminal to the other, usually not less than 100 miles apart. These crews do but a limited amount of switching. Requirements of the labor unions prevent these crews from doing local switching. The local road-haul crews, which are in fact the switching crews, with terminals at two different places, do that sort of switching. (R., 592; Tr., 552-5.)

R. E. Riley, traffic director of the Chicago Brick Company and the Lake Sand Corporation, and engaged in railroad and industrial traffic service since 1897, (R., 710; Tr., 1009), testified that line-haul rates should not even be remotely associated with rates in the Chicago switching district. (R., 714; Tr., 1021.)

R. C. Davidson, general freight agent for the Chicago, Rock Island & Pacific Railway Company at Chicago (R., 819; Tr., 1445) testified in response to a question by Examiner Faul (R., 820; Tr., 1448) that while an answer should be based upon a cost study, which he had not made, it would be more expensive to handle a road-haul shipment from points outside the district than between points within the district, and even so rates should be related to the rates within the district, but from outside points rates should be somewhat higher than from points within the district, that rates within the district should not be less than 5 cents under, nor more than 5 cents under, the rates from outside points. (R., 820; Tr., 1448.)

Although the carriers at the first hearing presented no comparisons of switching rates within the district with line-haul rates, numerous comparisons of that nature were presented by the shippers who participated in the hearing. Such

comparisons were with lower line-haul rates maintained by the carriers in the territory immediately adjacent to the Chicago switching district and are covered by Exhibits Numbers: 18 (R., 548; Tr., 340), 39 (R., 597; Tr., 575), 45 (R., 604; Tr., 600), 46 (R., 606; Tr., 614), 47 (R., 606; Tr., 615), 48 (R., 606; Tr., 616), 49 (R., 620; Tr., 664), 76 (R., 744; Tr., 1158), 77 (R., 745; Tr., 1161), 78 (R., 745; Tr., 1162), and 79 (R., 745; Tr., 1163), and No. 3 (R., 1263; Tr., 165) in Docket 24950.

While no exhibits involving comparisons of switching rates in other districts were introduced by the carriers, such exhibits were introduced by the shippers and included at the first hearings, Exhibits No. 56 (R., 658; Tr., 829) and 89 (R., 821; Tr., 1452). In addition, evidence from shippers was received orally as to switching rates in other districts, as is indicated at (R., 858, Tr., 1573-4; R., 1225, Tr., 46-7; R., 1235-37, Tr., 80-89; R., 1300, Tr., 330), etc.

The grain switching rates.

The Board of Trade of the City of Chicago, on behalf of its members, appeared at the hearings before the Interstate Commerce Commission, introduced evidence, and filed separate briefs setting forth the special situation surrounding the grain switching movement in Chicago, which differed from that of commodities generally as evidenced by the fact that continuously from the signing of the Lowrey agreement (May 2, 1910) until the order of the Commission herein assailed, grain had always been excepted from the all-commodity basis in the Lowrey agreement. (R., 40, 534, 676; Tr., 286, 900.)

The Board of Trade of the City of Chicago contends that there is no substantial evidence in the record to support a finding justifying any increases in the grain switch-

ing rates and that the Commission misconceived the issue as to the grain rates. (*Post*, page 148.)

Prior to the Commission's order there were no joint rates on grain switching within the Chicago switching district. Each individual railroad published its own rates in its own tariff (R., 679; Tr., 906), and the switching rates of the different railroads were not uniform in amount, but varied in amount as to each railroad and as to the character of services performed by each railroad, viz., whether the service was inbound from a connecting line of railroad to an elevator or mill, or outbound from an elevator or mill to a connecting line of railroad. (R., 676, 680 and 821; Tr., 900, 910, 911 and 1453.)

At the time the hearing commenced, the switching charges via nearly all of the trunk lines to elevators from connections with other lines were $4.95 per car. Practically all the belt lines made the same charge per car inbound, though there were exceptions. The Chicago & Alton rate was $6.00; the Chicago & Northwestern rate to Rockwell Elevator was $6.75; the New York Central rate was $3.60. From elevators to connecting lines, the rates varied more than they did inbound. Most road haul carriers charged $4.95, except the Chicago & Alton, which charged $6.00, the Burlington $6.75, and switching lines like the Chicago River & Indiana and the Belt Railroad, $6.75. Indiana Harbor Belt charges 2 cents per hundred pounds, which is an exception to the general rule, but it does very little business. In addition to these connecting line switching rates, there were intermediate switching rates frequently paid on grain. The Belt Railway's loaded car charge was $5.40; the Chicago, Burlington & Quincy and Indiana Harbor Belt likewise charged $5.40, while the Pullman Railroad charges were $4.00. (R., 679-680; Tr., 909-911.)

Single line grain switching rates will vary from $4.95 to

$6.30, $8.10, and up to $9.90 per car, and with other railroads a 2-cent rate per hundred pounds. (R., 680; Tr., 911.)

From the beginning, grain switching charges in Chicago have differed from those on other traffic. Those differences existed when the Lowrey agreement was made, and the existence of lower switching rates on grain than on other commodities was not changed by the Lowrey agreement. (R., 692; Tr., 942.)

At the commencement of the hearing in Docket 19610 (January 11, 1928) the railroads did not propose to increase the grain switching rates. (R., 56, 477, 693; Tr., 115-116.) No witness appeared for any railroad in justification of any increase in any individual line grain switching rate, and Witness Galligan testified that wherever there was any proposal to change any existing switching rate or to change the territory to affect switching rates, it was embraced either in his testimony or in the testimony of Mr. Saur, or in the exhibits. (R., 477; Tr., 116.)

Grain switching rates at other grain markets are variable, just as at Chicago, and the switching rates at Chicago are reasonable in comparison with the rates at these other markets. The Chicago market is in competition with these other grain markets, and any investigation of grain switching rates at Chicago should be accompanied by investigations of similar character at the other markets. (R., 821-824; Tr., 1452-1460.) These comparisons also show that the rates at the other markets are not based on cost. It is an economic factor to make switching rates on grain as low as possible, and there is a difference in the conditions surrounding the movement of grain compared with commodities generally. (R., 841; Tr., 1512.) Crosstown or industry switching at other large grain markets and mill-

ing centers exactly similar to crosstown switching in Chicago is absorbed. (R., 677; Tr., 903.) All of the grain elevators in the Chicago switching district are located in Illinois, except that of the New York Central and the Standard Elevator, which are located in Indiana. (R., 683.)

As to the switching of grain, it is not a case of one car at a time, but the movement of a good many at a time, not only crosstown, but road haul mixed in with it, and one illustration was cited of a movement of 446 cars of corn in drags of 65 to 70 cars. (R., 685; Tr., 921.)

The cost study was not evidence to justify increases in the grain switching rates, because, as heretofore stated, the cost study was ordered by the Commission on May 25, 1927, and the first hearing in this proceeding was held January 11, 1928, and at the beginning of the hearing the carriers did not propose any increases in the grain switching rates. In fact, Witness Galligan stated that the cost study and the exhibits filed in connection therewith were considered by the carriers as justifying the rates which they had published and filed (R., 477; Tr., 115) and which were under suspension, and grain was not included in the suspended tariffs.

The Commission itself said that it could not accept the cost study as a definite yardstick by which alone to measure the reasonableness of the rates under consideration. (R., 69.) Furthermore, at no time during the pendency of the proceedings before the Interstate Commerce Commission did any of the railroads file any tariffs naming increased switching rates on grain with either the Illinois or Indiana Commissions. (R., 332, 1091, 1118; Tr., 2844, 2931.)

EVIDENCE SHOWING LACK OF SIMILARITY BETWEEN INTRASTATE AND INTERSTATE COMMERCE.

The fact that the study costs made by the carriers did not deal with intrastate traffic separately from interstate traffic makes it impossible to make a comparison based on costs.

The data assembled in the traffic count of 1926, however, does provide a means by which we can compute separately for intrastate and interstate commerce the average length of haul.

For that portion of the cars embraced in the traffic count which were used in the cost study, the average lengths of haul are shown in the following table on page 115 of the *Second Report* (R., 163):

	Intrastate		Interstate	Per Cent Intrastate of Interstate	
Average Hauls	Illinois Miles	Indiana Miles	Miles	For Illinois	For Indiana
1 line	14.7	6.3	15.0	98.	42.
2 lines	15.9	7.3	27.5	58.	27.
3 lines	23.4	..	34.2	68.	..

As stated, these averages are based entirely on the study cars. Data as to number of cars and total car miles shown in Exhibit 97 permits us to compute similar averages for the cars embraced within the traffic count but excluded from the cost study as well as for the study and non-study cars combined. Such a computation shows as follows:

Average Hauls	Intrastate		Interstate	Per Cent Intrastate of Interstate	
	Illinois Miles	Indiana Miles	Miles	For Illinois	For Indiana
		Nonstudy Cars			
1 line	5.4	3.5	19.5	28.	18.
2 lines	15.6	5.4	31.9	49.	17.
3 lines	22.0	..	33.1	66.	..
		Study and Nonstudy Cars, Combined			
1 line	7.4	6.1	15.3	48.	40.
2 lines	15.8	7.2	28.7	55.	25.
3 lines	22.7	..	33.6	68.	..

The average distances stated in the last group reflect the average for all the cars embraced within the September, 1926, traffic count.

As illustrative of the difference in average distance of the traffic of individual shippers, the average haul intrastate in Indiana on sulphuric acid of the Grasselli Chemical Company was four miles (R., 1049; Tr., 2624), while the *shortest* interstate haul on sulphuric acid for the same company exceeds 25 miles (R., 1052; Tr., 2634). For crushed stone handled in 1-line service, the average haul intrastate in Illinois was 13.64 miles and interstate was 27.18 miles (R., 1129; Tr., 2968).

For all shipments of crushed stone the average haul of intrastate shipments was 18.9 miles and of interstate shipments 33.8 miles (R., 599; Tr., 580).

Although the switching costs claimed are developed on a time basis, there is no evidence of record from which we can determine the average time consumed in the average intrastate haul and compare it with the average time consumed in the average interstate haul.

The order of the Commission complained of is directed to all commodities. The evidence shows, however, that there are conspicuous differences between the kinds of commodities which move in interstate commerce in a particular service, such as 1-, 2-, or 3-line, and the kinds of commodities which move in intrastate commerce.

The division of the cars contained in the September, 1926, traffic count by commodities is shown in Exhibit No. 120, as taken from Exhibit 11-A. It is there shown that in 1-line service there moved in Illinois intrastate commerce 84 cars of wheat, with no cars moving interstate. Other commodities showing the same condition include hay, straw, alfalfa, other fresh vegetables, other products of agriculture, fresh meats, packing house products, eggs, butter, cheese, wool, hides and leather, anthracite coal, salt, other products of mines, logs, posts, poles, other products of forest, vegetable oils, automobiles, trucks, paper and books and canned goods. Conversely the same exhibit shows that in September, 1926, there was a 1-line movement interstate of beverages, but no 1-line movement intrastate in Illinois.

As to 2-line traffic, Exhibit 120 also shows that the following commodities moved in Illinois intrastate 2-line traffic with no cars shown as moving in 2-line interstate commerce: Hay; cottonseed products, excluding oil; "other fresh fruits"; potatoes; "other fresh vegetables"; dried fruits; sheep and goats; poultry; eggs, butter and cheese; wool, hides and leather; logs, posts and poles; ties; lime and plaster; automobiles and trucks; furniture; paper and books; and textiles. Conversely there was a 2-line movement interstate of household goods, but no such movement intrastate 2-line in Illinois. As to 3-line traffic, Exhibit 120 shows that the following commodities moved Illinois intrastate 3-line but that no cars of such commodities moved 3-line interstate: wheat, other grain; flour and meal; "other

fresh fruits"; "other products of agriculture"; eggs; "other animal products"; bituminous coal, coke, salt, ties; "other products of the forest"; vegetable oils; sugar and syrup; automobiles and trucks; household goods; fertilizers; and canned goods. There were 299 cars of cement that moved in 3-line interstate commerce with no such 3-line intrastate Illinois movement of cement.

EVIDENCE PURPORTING TO SHOW UNJUST DISCRIMINATION IN FACT AGAINST INTERSTATE COMMERCE.

The evidence received from the carriers at the further hearing purporting to show the revenue burden which resulted from rates on intrastate switching traffic somewhat lower in cents per hundredpounds than those contemporaneously maintained on interstate switching traffic, is shown in the record as follows: Exhibit 99, being a restatement of Exhibit 11-A (R., 944; Tr., 2158-9), which in turn covered the cars included within the traffic count of September, 1926, shows that, if the traffic for the month of September, 1926, be considered as the equivalent of one-twelfth of the entire year, the difference in gross revenue which would have resulted from applying the present basis of interstate rates to the intrastate traffic moving in that month in lieu of the existing intrastate rates would have amounted to $1,927,725§ in Illinois and $117,322§ in Indiana, a total of $2,045,000. (R., 945; Tr., 2161.) This difference in gross revenue is referred to as an "estimated annual loss." (R., 945; Tr., 2161.)

Exhibit 101 (R., 946; Tr., 2163) is a similar arithmetical calculation applied to the traffic moving in the week of November 9 to 15, 1931. On the result of that calculation, expanded to the basis of a year, the carriers compute the net

§ This exhibit as corrected is 99-A and gives these figures as $2,683,981 and $94,244.

annual loss at $947,639† on Illinois intrastate and $69,953 on Indiana intrastate traffic, or a total of $1,017,600. (R., 946; Tr., 2164.)

Exhibit 103 (R., 947; Tr., 2166) is a similar arithmetical calculation applied to the traffic moving in the week of January 11 to 16, inclusive, 1932, which, similarly expanded, is relied upon by the carriers as showing an estimated net annual loss in Illinois intrastate traffic of $899,000* and on Indiana intrastate traffic of $82,500, a total of $981,600. (R., 947; Tr., 2166-7.) It will be observed that these studies constitute no more than the arithmetical application of increased rates to traffic moving on the rates in effect prior to the date of the order complained of. Elsewhere we refer to the evidence, or rather lack of evidence, from carrier witnesses which would support an estimate that the traffic would be the same under increased rates as under the rates required to be increased.

As to the assumption that all intrastate traffic would continue to move by rail if the rates were increased the Commission found (R., 165) "This is not a fair assumption."

The carriers also introduced Exhibit 105-A (R., 948; Tr., 2170-1) which compares in terms of the whole traffic within the Switching district the proportion which moved interstate in the week of November 9 to 15, 1931, which was prior to the increase in the interstate rates with the proportion which moved interstate in the week of January 11 to 17, inclusive, 1932, which was subsequent to that rate increase. The following table summarizes the showing in that exhibit:

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†This exhibit as corrected is 101-A and gives this figure as $941,416.

*This exhibit as corrected is 103-A and gives this figure as $902,711.

INTERSTATE AND INTRASTATE TRAFFIC FOR WEEK OF NOVEMBER 9 TO 15, 1931, COMPARED WITH TRAFFIC FOR WEEK OF JANUARY 11 TO 17, 1932, RATIOS OF EACH KIND TO THE WHOLE TRAFFIC BEING STATED IN PERCENTAGES.

Chicago Switching District Traffic.

Number of Lines in Haul	Illinois Intrastate		Indiana Intrastate		Total Intrastate		Interstate	
	Nov. 1931	Jan. 1932	Nov. 1931	Jan. 1932	Nov. 1931	Jan. 1932	Nov. 1931	Jan. 1932
1	18.07	13.43	16.15	17.81	34.22	31.24	65.78	68.76
2	44.10	49.08	0.70	1.89	44.80	50.97	55.20	49.03
3	63.85	82.15	....	....	63.85	82.15	36.15	17.85
Composite 1, 2 and 3 line hauls .	35.39	38.63	7.08	8.12	42.47	46.75	57.53	53.25

No evidence was introduced, however, for the purpose of showing that, as a matter of fact, the decrease in the proportion which moved interstate from 57.53 to 53.25 per cent and the corresponding increase in the proportion which moved intrastate from 42.47 to 46.75 per cent was due to increasing the interstate rates to a basis higher than applicable intrastate. The witness introducing the exhibit on cross-examination stated (R., 1021; Tr., 2485-6):

> "I have no information in my possession to give the Commission from which it could find that business that moved interstate had been lost to somebody intrastate by reason of this rate situation. In making this statement it is my understanding that that statement would apply to the carriers as a whole, and they are making no contention that the business of somebody interstate has been taken by somebody else intrastate, due to the change in rates; there must have been some of it, however. We make no contention as to that as a basis for setting aside the lawfully constituted rates of the State of Illinois and the State of Indiana."

In connection with the showing that in January, 1932, the interstate traffic got down to 53.25 per cent of the whole switching traffic, it is shown on page 679 of the *First Report* (R., 43) that at the time of the 1926 traffic count the interstate traffic constituted only 40.29 per cent of the whole.

The only other evidence from the carriers which purported to show the burden on interstate commerce is Exhibit 110. (R., 1023 and following; Tr., 2493 and following.) That exhibit deals with the routes followed by 856 cars which moved subsequent to the increase in the intrastate rates. All of these cars moved from a point in Illinois to a point in Illinois and, according to the carriers, while the normal route between these Illinois points prior to December 10, 1931, involved a movement across the state line and back again, subsequent to the date just stated, the actual route of movement was wholly intrastate. (R., 951-2; Tr., 2182.)

The findings of the Commission regarding this exhibit, as found on pages 112 and 113 of the *Second Report* (R., 160-161) read as follows:

> "Witnesses for the carriers further testified that many of the industries cannot ship to points within the district except over interstate routes and therefore must pay the interstate rates of 3, 3.5, and 4 cents for one, two, and three-or-more-line hauls, respectively, while the industries which have intrastate routes available may ship on the basis of 2.5 cents for 1-line and 2-line hauls, and 3 cents for 3-or-more-line hauls, in carloads minimum 60,000 pounds, and in some instances at lower rates, but usually with higher minima, because of the exceptions under the Lowrey rates applicable on intrastate traffic. One of respondents' exhibits shows the so-called natural or interstate, and the unnatural or intrastate routes. The witness stated that in order to develop economy and efficiency of service certain routes have been designated for the movement of cer-

tain types of traffic, and explained that the term 'unnatural route,' via which many industries have been routing their shipments since the December 10 increases, instead of permitting them to move via the natural interstate routes, was used because such movements take the cars against the flow of the traffic. In other words, movement over the intrastate routes in most instances requires special handling by the motive power because it is either partially or wholly in the opposite direction to the usual trend of the district traffic, which is governed by the preponderance of the traffic moving into or out of the district in connection with line hauls. This exhibit shows that during the period December 10, 1931, to March 31, 1932, 856 cars were specifically routed and moved over the lower rated intrastate routes which formerly would have moved over interstate routes, for which the respondents show an alleged loss in revenue of $7,656. The record discloses that in some instances these unnatural or intrastate routes are not only shorter but involve less service. On cross-examination it developed that a considerable haul, in several instances amounting to approximately 20 miles, in connection with the so-called natural or interstate routes, could be saved by the use of more advantageously located interchange connections. A number of such movements were pointed out, and in those cases what was the natural haul over an interstate route would become the shorter haul via an intrastate route, and would involve the most economical movement. The extent of the round-about or circuitous hauls in connection with some of the so-called natural routes is disclosed in two of the illustrations shown on the exhibit where the natural or interstate routes involved hauls of 38 and 45 miles, as compared with the unnatural or intrastate hauls of only 13 and 23 miles, respectively. In this connection attention is called to the statement made in the prior report where, at page 692, it is stated:

> 'The record leaves no doubt that there is need for improvement in the handling of this traffic switching business, and we cannot too strongly urge upon the carriers the necessity for prompt

> study of these conditions looking toward the elimination of unnecessarily circuitous hauls, the proper location of interchange points and classification yards, etc.'"

Evidence introduced in connection with this exhibit shows that with but three exceptions every one of the 856 cars involved handling by the Pennsylvania Railroad, and that the Pennsylvania handling required each car to move across the state line and back again because that railroad has a classification yard at Colehour located partly in Indiana immediately adjacent to the state line which is used for classifying cars handled to and from points on the Calumet River branch of the Pennsylvania, which is in Illinois paralleling the state line and immediately adjacent thereto. (R., 974-5; Tr., 2282-85.)

Furthermore, the witness who presented the exhibit admitted that he was without information as to whether a situation similar to that described for the Pennsylvania obtained on any one of the other 34 roads in the district, the witness stating (R., 1026; Tr., 2506):

> "Naturally every road varies according to its physical layout."

No evidence as to relative costs via the state and interstate routes used by the cars in Exhibit 110 was offered, the witness stating (R., 1025; Tr., 2501):

> "I could not tell you at the present time whether the movement via the red line (the intrastate route) is more expensive or more costly to the carriers than via the black route (interstate route)."

And again (R., 1025; Tr., 2503):

> "Aside from the movement of those particular cars via the particular routes, as shown on the map, I did not make any investigation as to costs, character of service, or anything of that kind."

In so far as relative cost is at least in part measured by relative length of haul, the following is shown as to representative movements covered by Exhibit 110: In illustrations C, D, E, G and H the distance via the intrastate route was shown as 3 miles shorter than the distance via the interstate route. Similar differences in favor of the intrastate route are shown to the extent of 6 miles in illustration J, 8 miles in illustration M, 25 miles in illustration N, and 22 miles in illustration O.

While the carriers, in connection with Exhibit 110, treated routes from a point in Illinois to a point in Illinois via the Colehour yard located on the state line, as an interstate move, the testimony offered by the carriers at the hearings preceding the *First Report,* shows that at that time the carriers treated such a route as an intrastate route. Witness Vivian testifying (R., 887-8; Tr., 1664-5):

> "I determined between state and interstate by the usual methods used by carriers in preparing intrastate and interstate statistics, and in that you follow the actual route of movement. (Tr., 1664.) If a yard is located on the State line, whether the movement in the yard would be state or interstate depends on where the car came from and will go to. If it went out of one end of the yard into the other state and then went back into the state of origin, then it be an interstate movement and that would be determined from the route the car followed. We have records available that would enable you to determine whether a car went in at one end of the yard and out at the other or whether out at the end at which it came in."

The foregoing is a complete summary of all evidence introduced at the hearing for the purpose of showing that the intrastate rates against which the order complained of were directed, imposes a burden in fact on interstate commerce.

EVIDENCE RELATING TO EFFECT ON CARRIERS' EARNINGS OF AN INCREASE IN THE INTRASTATE RATES.

The principal witness on behalf of the carriers in support of their request for a 13th section order was Statistician Vivian, of the Chicago, Milwaukee, St. Paul & Pacific Railroad Company. If there is any affirmative evidence in this record as to the results on the earnings of the carriers from an increase in the intrastate rates, it is to be found in the testimony of this witness. The witness introduced Exhibits 99, 101 and 103 and the facts shown by those exhibits have been heretofore stated.

Mr. Vivian expressly stated that he did not know anything about whether the competition within the district by truck and by barge will take more business from the carriers, if rates be increased to the interstate basis, than under the present intrastate basis. (R., 1027; Tr., 2426.)

Exhibits presented by him showing the estimated loss in business to the carriers *assumed* that the carriers will have the business on the higher basis of rates. (The Commission's report (R., 165) states "This is not a fair assumption.") Mr. Vivian admitted that the carriers are losing business to the trucks all over the United States and insisted that there is no more danger to the carriers from truck competition in the Chicago district than there is in any place in the United States. (R., 1012; Tr., 2441.)

Revenue losses shown on the exhibits presented by him were *predicated on the assumption* that all of the present intrastate traffic would move on the increased rates. (R., 1030; Tr., 2521-5.)

Mr. Vivian admitted that he had no information as to any change in the flow of interstate traffic from rail lines to truck or water movements since the increased interstate rates became effective on December 10, 1931, and that he

had no information as to similar traffic changes intrastate subsequent to the Ex Parte 103 increases. (R., 1030; Tr., 2525.)

The following witnesses testified on behalf of the railroad defendants but not one of them gave any testimony as to the estimated revenue which would result from increasing intrastate rates to the interstate basis nor any testimony whatever that an increase in the intrastate rates would result in an increase in revenue:

George J. Shreeve, General Superintendent, Belt Railway of Chicago. (R., 956-965; Tr., 2190-2250.)

R. A. Barlow, Trainmaster, The Baltimore & Ohio Chicago Terminal Railroad. (R., 986-995; Tr., 2333-2374.)

F. A. Meyers, Operating Department, Indiana Harbor Belt Railway. (R., 995-1001; Tr., 2375-2400.)

C. L. Whiting, Superintendent of Terminals, Chicago, Milwaukee, St. Paul & Pacific R. R. Co. (R., 1001-3; Tr., 2404-9.)

J. L. Faulk, Division Superintendent, Chicago, Burlington & Quincy Railroad. (R., 1003-1006; Tr., 2411-2422.)

All of the witnesses just named dealt with operating matters and gave no testimony as to revenue under present or proposed rates.

Only two traffic men testified on behalf of the carriers. These were W. H. Ward, General Freight Agent of the Indiana Harbor Belt (R., 1068-1081; Tr.,1042-2772), and H. N. Jouver, General Freight Agent of the Baltimore and Ohio Chicago Terminal (R., 1081-6; Tr., 2774-2821).

Mr. Ward testified that he had made no investigation to determine whether increasing the rates on crushed stone to the interstate level within the district would have the effect of reducing or increasing revenues of the Indiana Harbor

Belt, and had formed no opinion on the matter. (R., 1076; Tr., 2743, 2744.)

Mr. Jouver made no investigation to determine whether the going into effect of the increased rates on crushed stone would increase revenue either for the Baltimore & Ohio Chicago Terminal or for carriers generally. (R., 1085; Tr., 2793.) Nor had he made any investigation to determine whether the 10 per cent increase in the intrastate switching rate had any effect on the movement of traffic in the switching district. (R., 1085; Tr., 2794-5.)

The foregoing evidence is all of the testimony of the traffic witnesses for the carriers which has any relation to the effect which would follow from increasing intrastate rates to the interstate basis, and affords no basis whatever for any finding that the revenue of the carriers would be increased as a result of increasing intrastate rates to the interstate basis. We come now to consider the testimony of the shippers.

Testimony was presented by representatives of the principal shippers within the district handling various commodities. Some of the important facts presented by them are as follows:

Standard Oil Company of Indiana:

This company refines petroleum and distributes its products. Assistant Traffic Manager Hollands (R., 1212-1219; Tr., 13-35) showed that as a result of the increase in interstate rates, effective December 10, 1931, all of the shipments to 8 stations in the Chicago switching district, which represented a movement of 3,907 cars by rail during 1931, had been diverted to truck. On these cars in 1931 the carriers earned $58,605. (R., 1215-16; Tr., 19-20, Ex. 1, Formal Complaint Case.)

The saving between truck costs and rail costs to the 8 stations on 3,907 cars, amounted to $36,776.46, which is an average of $9.41 per car. (R., 1215-16; Tr., 20.)

To 5 additional stations the company has a contract with a trucking company for services at a lower cost than that of handling by railroad, but at the time of the hearing had not moved any large volume by truck. (R., 1216; Tr., 20.) The Standard Oil Company during the railroad strike of 1920 used a tank boat and distributed therefrom throughout the city by truck. Mr. Hollands testified that there is no question but what the company can handle its business to plants in the Chicago switching district by water at very much less than the present rail rate. (R., 1216; Tr., 21.)

Moreover there is the possibility of the use of the pipe line now in place from the refinery at Whiting to some of the plants in the Indiana district. (R., 1217; Tr., 25.)

It is less trouble to handle by truck than to handle by railroad. (R., 1219; Tr., 32.)

Inland Steel Company:

Traffic Manager W. J. Hammond testified on behalf of that company (R., 1220-1231; Tr., 36-69):

This company manufactures iron and steel in all forms. In addition to the lower costs for movements of this company's traffic by truck than by rail, there are additional advantages in shipping by truck such as a saving in bracing, blocking, and wrapping costs and the much quicker delivery by truck; these advantages will dictate a movement will be by truck even at a transportation cost higher than by switching. The Inland Steel Company formerly handled none of its finished products by truck but subsequent to the increase in interstate rates on December 10, 1931, it has been compelled to use trucking service and during the

first three months of 1932 the Inland Steel Company handled to the Chicago switching district approximately 5,000,000 pounds of finished products by truck. (R., 1222-3; Tr., 41-2.)

Within three weeks prior to the hearing in May, 1932, the Inland Steel Company was notified by the largest purchaser of sheet steel in the switching district that it would accept no more carload deliveries, but that due to the low cost and improved service in handling, all movement must be by truck. (R., 1225; Tr., 42.)

Mr. Hammond stated that if the increased interstate rates were made effective on intrastate traffic the additional burden for switching would further divert to the trucks a large share of the present tonnage moving via rail and "give lower earnings to the railroads." (R., 1223; Tr., 44.)

Interlake Iron Corporation:

Mr. G. H. Staat, traffic manager, testified on behalf of this company (R., 1231-1240; Tr., 70-101):

If the 1-line rate on Illinois intrastate traffic be increased from the then existing rate of 40 cents to the interstate basis of 60 cents per ton, limestone instead of being received by rail would be received by vessel or by truck; flue dust, then being received by rail on a 2-line combination rate of $14.60 per car, would be handled by truck, if the rate be increased to the interstate basis of 70 cents per net ton. The truck cost is not more than 18 cents per net ton. (R., 1232-1235; Tr., 71-7.)

An increase in the rate on pig iron from 40 cents per gross ton, minimum 100,000 pounds, to 3 cents per hundred pounds, would result in a diversion to truck for the few city blocks involved in the movement or an extension of the plant tracks of the Interlake Iron Corporation into the

premises of the Republic plant and the performance of the movement by the company's own power, with resulting net loss to the rail carrier of at least $18 per car on every car so handled. During the three years last past the movement of pig iron had averaged 65,427.66 tons on which there would be a loss to the railroads annually of $26,171.06. (R., 1234; Tr., 76-7.)

From this company there is a daily movement of tar to the Barrett Company at 2.5 cents per hundred pounds; the interstate rate would be 4 cents. If the increase be made that tar will move by tank barge. (R., 1234; Tr., 77.)

The daily coke requirements of the company formerly moved via the Chicago Short Line and the Pennsylvania Railroads at 2.5 cents; that cost, to say nothing of the proposed increase, was too much of a burden for the furnaces to carry and by the substitution of trucks the cost was reduced from 2.5 cents to .9 cent per hundred pounds by truck. The monthly coke average from June 16, 1931, to April, 1932, was 10,530 tons, on which the rail carrier would have earned $5,265 per month. All of that revenue was lost by the rail carriers because even the 2.5 cent rate was too high. It follows that increasing the rate from 2.5 cents to 3 cents for 1-line and 3.5 cents for 2-line, cannot increase the rail revenue. (R., 1234-5; Tr., 78.)

Grasselli Chemical Company:

Testimony on behalf of this company was presented by J. W. Brown, its assistant traffic manager (R., 1046-1057; Tr., 2613-2652):

This company manufactures acid and other chemicals. In 1930 this company shipped from its plant at Grasselli, Indiana, to points in the Chicago switching district intrastate to Indiana destinations, 83,862,080 pounds of sulphuric acid

on a rate of 2 cents per hundred pounds in private cars, with no allowance for car hire. The rate was increased 10 per cent. If that rate be further increased to 3 cents per hundred pounds, a pipe line will be in operation within two weeks after the rate is advanced and what does not move by pipe line will be moved by truck. (R., 1047-1051; Tr., 2616, 2631.)

Trucking costs from Grasselli to Indiana Harbor are 31.5 cents per net ton and the pipe line cost to East Chicago is 36 cents per net ton. The inbound costs of trucking phosphate rock is less than 25 cents per net ton and that contract will be extended to cover trucking of coal, salt, and other commodities, if the rail rates be increased. (R., 1056; Tr., 2646-7.)

Consumers Company:

Testimony on behalf of this company was presented by W. J. Womer, Traffic Manager (R., 1126-1142; Tr., 2959-3020):

This company handles stone, sand, gravel, coal and similar commodities.

At the time of the hearing there were only two building construction jobs of any consequence then under way, and these were supplied with crushed stone wholly by truck: the new Post Office Building being erected over the tracks of the carriers on air rights, using approximately 50,000 tons, or 1,000 cars, and the new Field Building, half as much. Two or three years prior to the hearing virtually no stone was trucked from the quarries, but competition forced the installation of facilities for handling by truck from the quarries. Stone can be trucked cheaper than it can be moved by rail on the then intrastate rate. Increasing intrastate switching rates 10 per cent diverted some

stone shipments from rail to trucks. (R., 1133; Tr., 2979-81.)

Rates in effect at the time of the hearing are entirely too high, are more than crushed stone as a class of traffic will bear, and are forcing shippers to other forms of transportation. Since the hearings in the first case closed in 1928 a number of highways have been paved, some have been widened, trucks are more numerous and competition between trucks is keener. (R., 1140-1; Tr., 3010-12.)

While carriers have made efforts to establish line-haul rates that would meet truck competition on crushed stone, no such efforts have been made within the switching district. (R., 1141; Tr., 3012.)

To use the language of Mr. Womer, the establishment intrastate of the interstate rate basis of 3, 3.5 and 4 cents on crushed stone "is not going to help the railroads get a movement of crushed stone. That is going to help drive it away quicker than any one thing I know of." (R., 1141; Tr., 3013.)

Moulding Brownell Corporation:

E. L. Maynard, traffic manager, testified (R., 1284-1291; Tr., 247-286) in behalf of that company:

This company is engaged in the building material business, operating stone quarries, sand and gravel and brick plants, with 23 distributing yards located in all sections of Chicago. The company owns 80 trucks and also contracts for the use of trucks, the maximum cost of the hired service being 44 cents per ton, with a maximum haul of 17 miles. Quotations on any particular job are based on the cheapest transportation, whether by rail or by truck. (R., 1284-1286; Tr., 248-255.)

While there has been some movement of stone by rail

from Chicago switching district points to Indiana destinations in the switching district subsequent to the increase in freight rates, most of the stone is now moving by truck. (R., 1284-1286; Tr., 248, 255.)

This company has five boats which it operates on the lakes in handling sand, gravel and crushed stone. Competition by water transportation has been so serious that the Elgin, Joliet & Eastern eliminated the emergency charge on sand, gravel and crushed stone from producing points on its line to Gary and South Chicago. (R., 1299; Tr., 316, 317, 319.)

Dolese & Shepard Company:

Mr. O. P. Chamberlain, President, testified on behalf of that company (R., 1291-1298; Tr., 287-315):

This company is a wholesaler of crushed stone. There has been a tendency particularly in the past three years, to divert the handling of stone in the Chicago district from rail to truck, notwithstanding it is better business, everything else being equal, to load the stone on cars and move it by rail to its destination in the district. Conditions have forced the company to change its facilities and to add truck-loading facilities. During 1931, truck deliveries of stone from the company's quarries in the district amounted to 18.3 per cent of the total district deliveries and during the first four months of 1932 these increased to 31.2 per cent of the total. (R., 1292-3; Tr., 290-291.)

In September, 1931, prior to the increase in interstate rates, considerable stone was shipped to Whiting, Indiana Harbor and East Chicago, Indiana, but when the rate was increased from 2.5 cents to 3.5 cents for the 2-line haul, the business was lost by this company to a quarry nearer the Indiana line which made delivery by truck. Notwith-

standing Dolese & Shepard desire to continue the sale of stone in the Indiana portion of the switching district, it had no carload shipment during 1932 prior to the hearing; notwithstanding advantages in weighing and handling stone moved by cars, the company has been practically driven by conditions to the use of trucks. (R., 1294; Tr., 296-7.)

Acme Steel Company:

S. L. Felton, Traffic Manager, testified on behalf of this company (R., 1269-1272; Tr., 193-205):

This company manufactures and distributes steel of all kinds. 90 per cent of all single-line tonnage moving from its Riverdale plant to points in the Chicago switching district in single-line haul goes to the Archer Avenue plant of the company, an interplant service. The Archer Avenue plant would be dismantled and all the operations performed at the Riverdale plant, but for the fact that the Archer Avenue plant is the initial plant and held at a low overhead cost. Any substantial increase in the transportation cost from Archer Avenue to Riverdale, an intrastate movement, will hasten the discontinuance of operation at the Archer Avenue plant and consequently all that tonnage will be lost to the carriers. (R., 1271-2; Tr., 199.)

Youngstown Sheet & Tube Company:

H. H. Bascom, assistant traffic manager, testified on behalf of this company (R., 1273-1276; Tr., 207-218):

This company manufactures coke, iron, steel, pipe, etc. At the first hearing prediction was made that if any increase be made in rates then in effect on coal from the steel plant to the coke plant, or coke from the coke plant to the steel plant, arrangements would be made for a different method of transportation. Prior to any change in the rates

a conveyor was established which permitted handling of those materials at a lower cost than the switching rate. Pig iron can be moved from South Chicago plant to the Indiana Harbor plant at a rate not in excess of 2.5 cents per hundred pounds. (R., 1274; Tr., 211.)

International Paper Company:

Thomas E. Reilly, traffic manager, testified on behalf of this company (R., 1278-1280; Tr., 222-234):

This company handles paper of all kinds.

The present switching rate on paper for 3-line haul from Crooks Terminal Warehouse on the Chicago, Burlington & Quincy to a point on the Alton Railroad, is $15. The trucking charge is only $12 per car. The interstate rate for a 3-line haul is $21 per car. Paper is moved from the warehouse and from the mill to customers in the Chicago switching district by rail or by truck, whichever is the cheaper. (R., 1278-9; Tr., 222-5.)

The mill of the company in the Chicago district, is now closed down; if it resumes manufacture it will not use the railroads for movements to points in the Chicago switching district on the increased rates. (R., 1279; Tr., 225-6.)

Illinois Brick Company:

H. G. Brown, traffic manager, testified on behalf of this company (R., 1281-1284; Tr., 234-247):

This company manufactures brick at ten plants in the Chicago district, six of which are in the switching district. The total costs of all kinds on rail shipments of brick to the Post Office job was 65 cents per ton greater than by truck. (R., 1281-2; Tr., 236-7.)

The Barrett Company:

J. L. Roberts, traffic manager, testified on behalf of this company (R., 1143-1145; Tr., 3022-3030):

The Barrett Company produces paving tar principally, also roofing tar, creosote oil from crude coke tar received from the Interlake Iron Corporation and the Wisconsin Steel Company. For a number of years this crude tar was handled by tank barges but at the insistence of the rail companies the movement was changed to tank cars by rail. The Barrett Company has barge equipment and the installation of pipe line connection to and from the barge is a minor matter. If the 2.5 cent rate be increased to 3.5 cents, all the crude coke tar will be diverted from rail to barge. (R., 1143; Tr., 3022-3.)

The annual intrastate switching movement of crude tar to the Barrett plant is 80,000 tons. The present annual revenue to the rail carrier is $40,000; on the increased rate of 3.5 cents the revenue would be $56,000. In an effort to get $16,000 additional revenue, the carriers will lose their present $40,000 earnings. (R., 658; Tr., 826.)

In addition to the foregoing testimony of shippers, Mr. O. R. Livinghouse, for five years head of the Traffic Department of the Public Service Commission of Indiana, testified that transportation seeks that form that is least expensive; that if rail costs are increased "the transportation would probably seek other forms of transportation than to use rails." (R., 1122; Tr., 2944.)

There is no other testimony of record in the case bearing upon this question.

ASSIGNMENTS OF ERROR.

The following assignments of error are relied upon:

The Court erred (R., 1334-5):

1. In dismissing the bill of complaint.

2. In finding that the Interstate Commerce Commission's denial of plaintiffs' motions of January 28 and February 3, 1932, for a different cost study than that already made by the railroads did not constitute an abuse of discretion or denial of a full hearing.

3. In finding that the order of the Interstate Commerce Commission of July 3, 1933, is supported by sufficient evidence.

4. In finding that the order of the Interstate Commerce Commission of July 3, 1933, contains adequate findings of fact.

5. In finding that the order of the Interstate Commerce Commission of July 3, 1933, is sufficiently definite and certain.

6. In finding that the Interstate Commerce Commission had full power and authority to make its order of July 3, 1933, complained of.

7. In finding that the Interstate Commerce Commission's denial of plaintiffs' petition of August 17, 1933, for reopening for further hearing, for setting aside of the

order of July 3, 1933, for reargument and/or reconsideration, did not constitute an abuse of discretion or denial of a full hearing.

8. In finding that the order of the Interstate Commerce Commission of July 3, 1933, complained of herein is a valid and subsisting order of said Commission.

9. In denying plaintiffs' motion for an order staying the effective date of the order of the Interstate Commerce Commission of July 3, 1933, pending the appeal to the Supreme Court of the United States.

10. In failing to find the facts specially and to state separately its conclusions of law thereon as required by Equity Rule 70½.

11. In failing to enjoin, annul and set aside the order of the Interstate Commerce Commission of July 3, 1933.

Appellants abandon their ninth assignment of error which complained of the District Court's order of November 15, 1933, denying appellants' motion for stay of order of the Commission dated July 3, 1933, pending appeal to the Supreme Court, for the reason that the Court required the defendant carriers to preserve and account for all amounts received by them by virtue of said order of the Commission. (R., 1331.) All other assignments of error are insisted upon.

Statutes.

The pertinent provisions of the statutes are shown in Appendix A (*post*, page 165).

SUMMARY OF ARGUMENT.

I.

An order of the Commission must be enjoined (1) if the Commission misconceives its authority under the law, (2) if the parties have been denied a full and fair hearing, (3) if the order is not supported by the necessary subordinate findings, (4) if the order is indefinite and lacks precision, and (5) if the order and the findings on which it is predicated are not supported by substantial evidence properly presented and received. (pp. 66,67.)

United States v. *New York Central R. Co.*, 263 U. S. 603.

United States v. *Missouri Pacific R. Co.*, 278 U. S. 269.

Ann Arbor R. R. Co. v. *United States*, 281 U. S. 658.

Atchison, Topeka & Santa Fe Ry. Co. v. *United States*, 284 U. S. 248.

United States v. *Northern Pacific R. Co.*, 288 U. S. 490.

Florida v. *United States*, 282 U. S. 194.

I. C. C. v. *Northern Pacific R. Co.*, 216 U. S. 538.

Beaumont, S. L. & W. R. Co. v. *United States*, 282 U. S. 74.

Florida East Coast R. Co. v. *United States*, 234 U. S. 167.

I. C. C. v. *L. & N. R. Co.*, 227 U. S. 88.

Chicago Junction Case, 264 U. S. 258.

United States v. *Abilene & S. Ry. Co.*, 265 U. S. 274.

II.

The Commission failed to give effect to the provisions of Emergency Railroad Transportation Act, 1933, approved June 16, 1933. (pp. 67-72.)

Interstate Commerce Act, Section 15a, as amended June 16, 1933 (C. 91, Title 2, sec. 205, 48 Stat. 220). (See Appendix.)

Switching Rates in Chicago Switching District, 177 I. C. C. 669 (*First Report*) (R., 33).

Switching Rates in Chicago Switching District, 195 I. C. C. 89 (*Second Report*) (R., 137).

Florida v. *United States*, 282 U. S. 194.

Florida v. *United States*, No. 342, October Term, 1933, decided April 2, 1934.

III.

The order of the Commission is void because of an abuse of discretion by the Commission in denying motions of January 28, February 3 and February 18, 1932, for an order requiring the railroad respondents to conduct a cost study which would reflect conditions in 1932, and in denying the petition of August 15, 1933, for reopening, for further hearing, for reargument and/or reconsideration. The full hearing required by the Interstate Commerce Act was not had. (pp. 72-82.)

Interstate Commerce Act, Section 13(4) (49 U. S. C., Section 13(4)). (See Appendix.)

Atchison, Topeka & Santa Fe Ry. Co. et al. v. *United States*, 51 Fed. (2d) 510, 516.

Atchison, Topeka & Santa Fe Ry. Co. v. *United States*, 284 U. S. 248, 260, 262.

United States v. *Northern Pacific R. Co.*, 288 U. S. 490.

IV.

The order of the Commission is void because it is not supported by the necessary subordinate findings.

(a) THERE IS NO PROPER FINDING THAT THE INCREASED INTERSTATE RATES WOULD BE OR ARE REASONABLE *PER SE*. (pp. 83-86.):

Beaumont, S. L. & W. R. Co. v. *U. S.*, 282 U. S. 74, 86.

United States v. *Louisiana*, 78 L. Ed. Adv. Ops. 50.

(b) THERE IS NO FINDING THAT THE INTRASTATE TRAFFIC UPON WHICH THE RATES SUBJECT TO THE ORDER WERE ASSESSED IS OF A LIKE KIND AND SIMILAR TO THE INTERSTATE TRAFFIC IN RESPECT TO THE CONDITIONS UNDER WHICH THE SWITCHING SERVICE IS RENDERED. (pp. 86-89.)

Interstate Commerce Act, Sections 2, 3 and 13(4), (49 U. S. C. A., Secs. 2, 3 and 13(4)).

(c) THERE IS NO FINDING THAT AN INCREASE IN THE INTRASTATE RATES WILL PROVIDE ADDITIONAL INCOME FOR THE CARRIERS. (pp. 89-95.)

Florida v. *United States*, 282 U. S. 194.

Georgia Public Service Commission v. *A. C. L. R. R. Co.*, 146 I. C. C. 717.

Florida Fertilizer Case, 151 I. C. C. 602.

United States v. *Louisiana*, 78 L. Ed. Adv. Ops. 50, 56 (*Louisiana Surcharge Case*).

Florida v. *U. S.*, No. 342, October Term, 1933, decided April 2, 1934.

(d) THERE IS NO FINDING THAT THE INTRASTATE RATES AS IN EFFECT PRIOR TO THE ORDER OF THE COMMISSION WERE LESS THAN MAXIMUM REASONABLE RATES. (pp. 95-98.)

Virginia Corporation Commission v. *A. & R. R. R. Co.*, 136 I. C. C. 173, 180.

Georgia Public Service Commission v. *U. S.*, 283 U. S. 765, 770.

U. S. v. *Louisiana*, 78 L. Ed. Adv. Ops. 50, 56 (*Louisiana Surcharge Case*).

Fifteen Per Cent Case, 1931, 178 I. C. C. 539, 179 I. C. C. 215.

(e) THERE IS NO FINDING WHICH DEFINES WHAT INTERSTATE COMMERCE IS BEING DISCRIMINATED AGAINST OR IN WHAT MANNER THE ALLEGED UNJUST DISCRIMINATION OCCURS IN FACT. (pp. 98-100.)

(f) THERE IS NO FINDING WHICH SEPARATES THE INTRASTATE AND INTERSTATE PROPERTY, REVENUES AND EXPENSES OF THE CARRIERS SO AS TO MAKE IT POSSIBLE TO COMPARE REVENUE WITH COSTS FOR INTRASTATE SWITCHING TRAFFIC CONSIDERED SEPARATELY FROM INTERSTATE SWITCHING TRAFFIC. (pp. 100-102.)

Smith v. *Illinois Bell Telephone Co.*, 282 U. S. 133.

(g) THE EARLIER DECISIONS OF THIS COURT INVOLVING SECTION 13 (4) ORDERS ARE NOT SIMILAR IN THEIR FACTS TO THE INSTANT CASE. (pp. 102-105.)

Georgia Public Service Com'n. v. *U. S.*, 283 U. S. 765.

Alabama v. *U. S.*, 283 U. S. 776.

Louisiana Public Service Com'n. v. *T. & N. O. R. Co.*, 284 U. S. 125.

Wisconsin Railroad Commission v. *C. B. & Q. R. Co.*, 257 U. S. 563.

U. S. v. *Louisiana*, 78 L. Ed. Adv. Ops. 50, 56 (*Louisiana Surcharge Case*).

Florida v. *U. S.*, 282 U. S. 194.

V.

The order of the Commission is void because it is indefinite and lacks precision in respect to the carriers subjected to its terms. (pp. 105-107.)

Texas & Pacific Ry. Co. v. *U. S.*, 289 U. S. 627.

VI.

The order of the Commission is void because there was no evidence upon which the Commission could predicate findings which are necessary to support an order under Section 13(4) of the Act. (p. 108.)

Interstate Commerce Com'n. v. *L. & N. R. R. Co.*, 227 U. S. 88, 92.

(a) THERE IS NO EVIDENCE TO SUPPORT A FINDING THAT THE RATES APPROVED ON INTERSTATE SWITCHING TRAFFIC IN THE *FIRST REPORT* ARE JUST AND REASONABLE. (p. 109.)

(1) THE COST STUDY DOES NOT PROVIDE SUCH EVIDENCE AND STANDING ALONE, WAS IN FACT FOUND BY THE COMMISSION TO BE INSUFFICIENT. THAT FINDING OF INSUFFICIENCY WAS WELL JUSTIFIED BY DEMONSTRATED INFIRMITIES IN THE COST STUDY. (pp. 109-117.)

Switching Rates in Chicago Switching District, 177 I. C. C. 669.

Boston Wool Trade Asso. v. *Director General*, 69 I. C. C. 282, 298-9.

Switching at Little Rock, 140 I. C. C. 583, 584.

Florida East Coast R. Co. v. *U. S.*, 234 U. S. 167.

(2) THE COMPARISONS WITH LINE-HAUL RATES IN WIDELY REMOVED TERRITORIES WHICH THE COMMISSION USED AS AN ADDITIONAL TEST OF THE REASONABLENESS OF RATES WERE NOT IN EVIDENCE, NOR WERE THEY SUPPORTED BY EVIDENCE AS TO COMPARABILITY OF CONDITIONS. (pp. 118-122.)

U. S. v. *Abilene & S. R. Co.*, 265 U. S. 274, 288.

(b) THERE IS NO EVIDENCE TO SUPPORT A FINDING THAT THE INTRASTATE RATES SUBJECT TO THE ORDER UNJUSTLY DISCRIMINATED AGAINST INTERSTATE COMMERCE. (pp. 122-126.)

(c) THERE IS NO EVIDENCE WHICH SEPARATES THE INTRASTATE AND INTERSTATE PROPERTY, REVENUES AND EXPENSES OF THE CARRIERS SO AS TO MAKE IT POSSIBLE TO COMPARE REVENUE WITH COSTS FOR INTRASTATE SWITCHING TRAFFIC CONSIDERED SEPARATELY FROM INTERSTATE SWITCHING TRAFFIC. (pp. 126-127.)

Smith v. *Illinois Bell Telephone Co.*, *supra*.

(d) THERE IS NO EVIDENCE TO SUPPORT A FINDING THAT THE INTRASTATE TRAFFIC SUBJECT TO THE ORDER IS SIMILAR TO THE INTERSTATE TRAFFIC IN THE DISTRICT IN RESPECT TO (1) COST OF SERVICE, (2) KIND OF TRAFFIC, (3) THE CARRIERS PERFORMING THE SERVICE AND (4) THE CONDITIONS AND CIRCUMSTANCES SURROUNDING THE SERVICE. (pp. 128-136.)

Florida East Coast R. Co. v. *United States*, 234 U. S. 167.

Increased Switching Charges at Detroit, 91 I. C. C. 82.

United States v. *Illinois Central R. R. Co.*, 263 U. S. 515, 524.

I. C. C. v. *B. & O. R. R. Co.*, 145 U. S. 263, 284.

(e) THERE IS NO SUBSTANTIAL EVIDENCE TO SUPPORT A FINDING THAT THE INCREASE IN THE INTRASTATE RATES TO THE INTERSTATE BASIS WOULD IMPROVE THE POSITION OF THE APPELLEE CARRIERS IN SO FAR AS ADDITIONAL INCOME IS CONCERNED. (pp. 136-139.)

Florida v. *United States*, 282 U. S. 194.

Georgia Public Service Commission v. *A. C. L. R. R. Co.*, 146 I. C. C. 717.

(f) THERE IS NO EVIDENCE TO SUPPORT THE FINDING THAT THE UNJUST DISCRIMINATION AGAINST INTERSTATE COMMERCE FOUND TO EXIST WAS OCCASIONED BY THE SAME CARRIERS WHO MAINTAINED THE INTRASTATE RATES WHICH UNJUSTLY DISCRIMINATED IN FAVOR OF INTRASTATE TRAFFIC (pp. 139-141.)

Texas & Pacific R. Co. v. *United States*, 289 U. S. 627.

VII.

The order of the Commission holding that the intrastate rates on grain switching constituted discrimination against interstate commerce is void for the following reasons: (p. 142.)

(A) IT IS BASED ON ITS FORMER ORDER OF JULY 31, 1931, WHICH WAS VOID BECAUSE THERE WAS NO SUBSTANTIAL EVIDENCE IN THE RECORD TO SUPPORT A FINDING JUSTIFYING ANY INCREASES IN THE THEN EXISTING INTERSTATE GRAIN SWITCHING RATES. (pp. 142-148.)

Florida v. *United States*, 282 U. S. 194, 214.

United States v. *Abilene & S. R. Co.*, 265 U. S. 274, 288.

Florida East Coast R. Co. v. *United States*, 234 U. S. 167.

(B) IT WAS BASED UPON A MISCONCEPTION OF THE ISSUES INVOLVED WITH RESPECT TO THE GRAIN SWITCHING RATES AND A MISINTERPRETATION OF THE POWERS DELEGATED TO IT BY THE INTERSTATE COMMERCE ACT AND WAS IN DIRECT VIOLATION OF SECTION 15 (7) OF THE INTERSTATE COMMERCE ACT. (pp. 148-156.)

Interstate Commerce Act, Section 15(7). (See Appendix.)

Beaumont, S. L. & W. R. Co. v. *United States*, 282 U. S. 74, 86.

Coxe Brothers & Co. v. *Lehigh Valley R. R. Co.*, 4 I. C. R. 535, 582.

National Hay Asso. v. *Lake Shore & Michigan Southern R. Co.*, 9 I. C. R. 264.

Anaconda Copper Mining Co. v. *Director General*, 57 I. C. C. 723, 729.

United States v. *Abilene & S. R. Co.*, 265 U. S. 274, 288, 289.

I. C. C. v. *L. & N. R. Co.*, 227 U. S. 88, 93.

Atchison, Topeka & Santa Fe R. Co. v. *United States*, 284 U. S. 248, 262.

VIII.

The difference between intrastate rates on the one hand and interstate rates on the other hand is justified by the difference between intrastate service and interstate service. (pp. 156-158.)

Switching Rates in Chicago Switching District, 195 I. C. C. 89, 119.

Coxe Brothers & Co. v. *Lehigh Valley R. R. Co.*, 4 I. C. R. 535, 560.

IX.

The court erred in failing to find the facts specially and to state separately its conclusions of law thereon as required by Equity Rule 70½. (pp. 159-161.)

Equity Rule 70½.

Public Service Commission of Wisconsin v. *Wisconsin Telephone Co.*, 289 U. S. 67.

Public Service Commission of Indiana v. *Northern Indiana Public Service Co.*, 289 U. S. 703.

ARGUMENT.

I.

An order of the Commission must be enjoined (1) if the Commission misconceives its authority under the law, (2) if the parties have been denied a full and fair hearing, (3) if the order is not supported by the necessary subordinate findings, (4) if the order is indefinite and lacks precision, and (5) if the order and the findings on which it is predicated are not supported by substantial evidence properly presented and received.

At the outset let it be made plain that we do not question the power of the Commission to enter an order under Section 13 of the Act prescribing minimum rates on intrastate traffic. We do assert, however, that the validity of such an order is conditioned upon compliance with the following propositions of law:

1. The Commission must not proceed upon a misconception of its authority. (In *United States* v. *New York Central R. Co.*, 263 U. S. 603, an order of the Commission dealing with interchangeable mileage books was set aside because the Commission misconceived what was required of it by the statute under which it acted. See also *United States* v. *Missouri Pacific R.*, 278 U. S. 269, the *Subiaco* case involving the construction of Section 15(4) of the Act, and *Ann Arbor R. R.* v. *United States*, 281 U. S. 658, the latter involving the construction of the Hoch-Smith resolution.)

2. The parties must be given a full and fair hearing. (*A. T. & S. F. Ry. Co.* v. *United States*, 284 U. S. 248; *United States* v. *Northern Pacific R. Co.*, 288 U. S. 490.)

3. The order must be supported by the necessary subordinate findings. (*Florida* v. *United States*, 282 U. S. 194; *I. C. C.* v. *Northern Pacific R. Co.*, 216 U. S. 538; *Beaumont, S. L. & W. R. Co.* v. *United States*, 282 U. S. 74.)

4. The order must be definite and precise.

5. The order and findings on which it is predicated must be supported by substantial evidence properly presented and received. (*Florida East Coast R. Co.* v. *United States*, 234 U. S. 167; *Interstate C. C.* v. *L. & N. R. Co.*, 227 U. S. 88; *Chicago Junction Case*, 264 U. S. 258; *United States* v. *Abilene & S. Ry. Co.*, 265 U. S. 274, in which latter case this court held that records of carriers in the Commission's files can not be treated as evidence when not introduced as such in the proceeding before the Commission.)

II.

The Commission failed to give effect to the provisions of Emergency Railroad Transportation Act, 1933, approved June 16, 1933, (C. 91, Title 2, sec. 205, 48 Stat. 220).

When the Commission's order of July 31, 1931, prescribing reasonable rates for interstate switching within the Chicago switching district was made, Section 15a with all of its provisions, as approved February 28, 1920, and Section 13 (4), as set forth in Appendix A hereto, were in full force and effect. After the instant case was submitted on brief and oral argument and prior to July 3, 1933, the Congress repealed all of Section 15a and substituted in its stead a new rule of rate-making. It is our contention that the duty of the Commission was substantially changed by the enactment of the Emergency Railroad Transportation Act of 1933, insofar as the procedure to be followed in considering such cases is concerned.

Under Section 15a prior to June 16, 1933, the Commission was required in the exercise of its power to prescribe just and reasonable rates, to initiate, modify, establish or adjust rates so that carriers as a whole, or as a whole in each of such rate groups or territories as the Commission may from time to time designate, will earn an aggregate annual net railway operating income equal, as nearly as may be, to a fair return upon the value of the property used in transportation. When the instant case was decided that provision of law had been changed to read as follows:

> "'Sec. 15a. (1) When used in this section, the term "rates" means rates, fares, and charges, and all classifications, regulations, and practices relating thereto.
>
> (2) In the exercise of its power to prescribe just and reasonable rates the Commission shall *give due consideration, among other factors, to the effect of rates on the movement of traffic; to the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management, to provide such service'.*" (Our italics.)

The italicised portion of the section as above set forth is new matter and all matter, other than the unitalicized matter in the above quotation, in Section 15a as added by the Transportation Act, February 28, 1920, was stricken from the Interstate Commerce Act.

When the order in the instant case was made the treatment of the carriers as a group in rate-making no longer was to be followed. The Commission is simply required in prescribing just and reasonable rates, to give due consideration, among other factors (a) to the effect of rates on the movement of traffic; (b) to the need in the public interest of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such ser-

vice; and (c) to the need of revenue sufficient to enable the carriers to provide such service. This is a requirement to consider the needs of the individual carriers and not the needs of the group.

There is no finding in the instant case as to what rates would be just and reasonable, giving due consideration, among other things, to the factors just named. As to the first of these, *i. e.*, the effect of rates on the movement of traffic, the evidence in this record is complete in its showing that the 3, 3.5 and 4 cent rates for 1-line, 2-line and 3-or-more-line, respectively, prohibit a large movement of traffic.

In the Statement of the Case we set forth the evidence in this respect. Suffice it here to say that not a single witness on behalf of the carriers gave any testimony as to the effect of the increased interstate rates on the movement of traffic. Representative shippers all joined in the statement that truck competition was keener than ever before; highways were in better shape and afforded opportunity for much greater movement of traffic in the switching district than ever before; that in many instances even the intrastate rates of 2.5, 2.5 and 3 cents were so much in excess of the costs of movement by truck, that a large volume of movement intrastate was being performed by truck; and that increasing the intrastate rates to the interstate basis would divert a much greater volume of traffic to other forms of transportation or plant conveyors. This testimony was so impressive that in the proposed report of Examiners Faul and Wilbur (R., 131-2) they reviewed the testimony as to the effect on the movement of traffic that would follow increasing the intrastate rates to the increased interstate basis, noted the decision of this Court in the *Florida case*, 282 U. S. 194, and then said (R., 134):

"The record *does not indicate* that an increase in the

> intrastate rates to the level of the interstate rates would result in increased revenues to the carriers. The testimony shows that the existing competition by motor truck is material, and indicates that this means of transportation will be utilized to a greater extent if the intrastate rates are increased, and also that some tonnage would be diverted to barges and pipe lines." (Our italics.)

When the Commission came to decide the case it found (R., 165) that over improved highways and navigable waterways a substantial volume of tonnage was handled that otherwise would move by rail, and that witnesses testified that any increase in the present intrastate rates on their commodities, which included pig iron, paving and roofing tar, sulphuric acid and other chemicals, crushed stone, and others would divert the tonnage to motor trucks, pipe lines or barges. Yet the Commission said (R., 165):

> "we are not convinced that any substantial proportion of the traffic now moving by rail intrastate will be diverted to other forms of transportation if the rates found reasonable for interstate traffic are applied thereto."

It will be noted that here is a negative statement of belief, a mere expression as to the mind of the Commission, that it is *not convinced* that the diversion will occur. However, when it comes to the formal findings (R., 166), we note the following:

> "While the evidence shows that the existing competition by motor truck is material, and indicates that this means of transportation will be utilized to a greater extent if the intrastate rates are increased, and that therefore, some additional tonnage in all probability will be lost to trucks, or diverted to barge and pipe-line movement, the record nevertheless is convincing that the carriers will derive a substantial increase in revenue if the intrastate rates are increased to the interstate basis, and we so find."

We insist that the expression "we so find" in the concluding portion of the quotation above set forth in the formal finding is a mere conclusion of the Commission and that it must set forth in its findings substantial facts from which this Court could affirmatively conclude that the carriers will derive a substantial increase in revenue if the intrastate rates are increased to the interstate basis.

We call attention to these expressions in the Commission's report to show that it did not give that proper consideration which Emergency Railroad Transportation Act, 1933, requires should be given to the effect of the proposed increased rates on the movement of traffic. There is nothing in the record to show that the railroad respondents are not now furnishing adequate and efficient railway transportation service on the 2.5, 2.5 and 3 cent intrastate rates. Moreover, the evidence shows that the nine switching carriers who derive their revenue exclusively from service in the Chicago switching district, provide such service, and that their average rate of return over a period of years exceeded the rate of return prescribed for carriers as a whole or in a group.

Therefore, we insist that the Commission has failed to heed the requirements of Emergency Railroad Transportation Act, 1933, in the three particulars specified in amended Section 15a. In the decision of this Court of April 2, 1934, in *Florida* v. *U. S.*, No. 342, October Term, 1933, Mr. Chief Justice Hughes comments upon the provisions of Emergency Railroad Transportation Act, 1933, notes that as a result of the amendment to Section 15a the group method of rate-making is eliminated and a new rule of rate-making is substituted. While it is true that the new rule of rate-making leaves the power of the Commission under Section 13 (4) intact, it by no means relieves the Commission from

the necessity of considering the matters provided in the amended Section.

What we are here complaining of is that the Commission did not give that consideration to the factors specifically named in Section 15a. Mere lip service is not sufficient; full effect must be given to substantial evidence in this respect. That has not been done.

III.

The order of the Commission is void because of an abuse of discretion by the Commission in denying motions of January 28, February 3 and February 18, 1932, for an order requiring the railroad respondents to conduct a cost study which would reflect conditions in 1932, and in denying the petition of August 15, 1933, for re-opening, for further hearing, for reargument and/or reconsideration. The full hearing required by the Interstate Commerce Act was not had.

The original decision of the Commission approving increased interstate switching rates was made on July 31, 1931. The testimony upon which that decision was based was submitted at hearings which concluded on September 21, 1928, (R., 941), and related almost entirely to a cost study by 15 of the 35 rail carriers in the Chicago switching district for single-week periods at varying times during the year 1927, applied to a traffic test made by all of the railroads for the month of September, 1926.

The rates found reasonable for interstate application became effective December 10, 1931. The motion of the carriers for a 13th Section order requiring intrastate switching rates within the Chicago switching district in Indiana and in Illinois to be made the same as the contemporaneous interstate rates, was filed in September, 1931. That motion

by the carriers was denied by the Commission. The Commission of its own motion on November 2, 1931, reopened Docket 19610 for further hearing with respect to the relation of rates and charges for switching in intrastate commerce to rates prescribed for like switching in interstate commerce.

Prior to the further hearing to be had in accordance with said order of reopening, the Public Service Commission (of Indiana), on March 8, 1932; the Illinois Commerce Commission on February 6, 1932, and the Acme Steel Company (with 57 other shippers) on January 30, 1932, filed their separate motions (see Appendix B hereto) with the Commission in which the Commission was asked to require the respondent railroad carriers to conduct a cost study under the supervision of the Commission for a representative period of one month by each and every carrier within the Chicago switching district.

On page 3 of this Appendix will be noted the allegation that the carriers' cost study, then of record, was defective in several respects among other things:

> "(f) The testimony as to cost relates wholly to a period not later than October 25, 1927, and the hearing was concluded on September 21, 1928."

Further, it was pointed out (page 14) in support of such allegation:

> "Attention is again directed to the fact that all of the testimony introduced in this proceeding as to cost, relates wholly to a period not later than October 25, 1927, and the hearing was concluded on September 21, 1928.
>
> It would thus appear that your Commission is asked by the respondent carriers to require increases in intrastate switching rates within the State of Illinois based largely upon evidence of cost relating to a period over four years ago."

The three motions were denied February 8 and March 14, 1932.

At the hearing on May 2, 1932, request was again made for data reflecting conditions at that time. (R., 943; Tr., 2140.) It was pointed out in response to a statement by one of the presiding Examiners to the effect that the reasonableness of the interstate switching rates had already been determined, that the determination was on a record five years old, that the decision of the Commission could not properly be based upon a record so old, to which the Examiner replied "you made the same argument in your recent petition to the Commission for a rehearing and to bring the record down to date and that petition or those petitions were denied:" (R., 943; Tr., 2142.)

The position of the Illinois Commerce Commission was stated in the testimony of Mr. George H. Shafer, Transportation Rate Expert for that Commission. Counsel had asked Mr. Shafer to state the position of the Illinois Commerce Commission. Examiner Faul pointed out that the Commission had overruled three motions for a new cost study, but permitted Mr. Shafer to answer the question. He stated (R., 1093; Tr., 2852-5):

> "Naturally we feel the evidence as to cost taken in connection with 1927 traffic, the hearing having closed in 1928, should not be used as a basis for increasing rates in the state of Illinois, and our position is that the record today should reflect present-day conditions, and that an order for the future should be based upon those conditions, upon the facts as they are today. * * * The Illinois Commerce Commission insists that before the laws of the state of Illinois are set aside entirely, we shall have opportunity to have the facts presented as they are at the time the action of the Interstate Commerce Commission is taken."

Mr. O. R. Livinghouse, Examiner-in-Chief of the Traffic

Bureau for Public Service Commission of Indiana, in his testimony stated the position of that Commission as follows (R., 1121, 2; Tr., 2943):

> "I do not know whether the cost study is representative of present-day conditions. I say that the time that has elapsed is so great, and conditions have changed so, that a cost study of that earlier period I do not think is proper to base a decision on at this time. We desire an up-to-date cost study, and so petitioned the Commission, but were refused, and in that we ask for a cost study to cover not only the fifteen lines involved in the prior study, but to cover all carriers included in the switching district that the cost study covered, and longer period of time than the prior one, because the time was not sufficiently long to determine the real true cost basis; * * * I know there has been a material change in the cost of commodities, and many items of operating expenses in all switching districts. (R., 1122; Tr., 2945.) * * * Conditions in many switching communities change frequently probably not from day to day, but there will be changes from month to month. A study of the February movement might not be applicable to August. If we made a study for December it would not be applicable for July and because one made in 1930 would not be applicable in 1931 is the reason we ask for a more complete cost study. * * * Conditions change from month to month. (R., 1123; Tr., 2947-8.) * * * All the costs were made jointly under all 3 commissions. No valuation of the switching facilities lying within Indiana, separate and distinct from the other was submitted at the hearing, nor were operating costs applied to that property within Indiana to purely intrastate traffic shown at the hearing." (R., 1125; Tr., 2954.)

In the decision of July 3, 1933, 195 I. C. C. 89 at page 92 (R., 140) the Commission refers to the criticisms made by the representatives of the Illinois Commerce Commission, Public Service Commission of Indiana and the shippers; at page 95 (R., 143) the Commission comments on the position of the state commissions and of the shippers and their re-

quest that evidence as to costs should be brought down to date to reflect present-day changed conditions.

Subsequent to the Commission's decision of July 3, 1933, in which the Commission found a violation of paragraph (4) of Section 13 of the Interstate Commerce Act, a joint petition was filed by appellants with the Commission on August 15, 1933, seeking a reopening for further hearing, for setting aside of the order, for reargument and/or reconsideration. That petition restates the grounds upon which the motions for a new cost study were based, and is printed as Appendix D to the bill of complaint herein. (R., 169.)

Practically every ground urged in the bill of complaint herein as the basis for setting aside the Commission's order was embraced in said petition for further hearing. It was pointed out in paragraph 6 of Section II of the petition that the finding as to what the interstate rate should be was made on a record closed in 1928, the evidence therein relating to a cost study was ascertained as to certain traffic moving during certain periods in 1927 over certain railroads and was applied on certain traffic moving in September, 1926. In respects other than costs it was pointed out that conditions had changed. (R., 173.)

In paragraph 16 of Section II of the petition it was alleged (R., 177):

> "The cost studies presented by the respondents are based on arbitrary assumptions involving the use of unweighted averages, are of carriers not representative of the entire switching district, are of alleged costs of a few of the carriers for periods of time entirely too limited in scope and not representative of the years' business over a period of time sufficient to reflect the average annual cost of switching service; were made six years ago, were applied against traffic moving seven years ago, and therefore are so remote as to be wholly improper as a basis for finding present costs, and are

otherwise so defective as to constitute no proper basis for a finding as to reasonableness or unreasonableness of rates now in effect, in effect prior to December 10, 1931, and proposed to be made effective September 20, 1933, on interstate traffic and on intrastate traffic."

In Section III of said petition (R., 180) it was alleged that conditions had changed, that truck competition had vastly increased, and for those reasons, among others, the Commission was requested to reopen the proceedings for further hearing.

In the absence of a new cost study it was impossible for appellants to show in detail at the hearings on which the *Second Report* was based, the extent to which present costs of transportation are less than in 1926-1927. It is shown, however, on pages 10, 11 and 12 of Exhibit 120 (R., 1241; Tr., 103), that comparing 1931 with 1926 there was a 10 per cent reduction in the cost of labor and that the labor cost alone was 43.42 per cent of the engine-hour costs developed in the cost study. It was also there shown that there was a 10 per cent reduction in cost of fuel, and a 2 per cent reduction cost in cross ties. (R., 1247; Tr., 123.)

Pages 20 and 20½ of Exhibit 120 show that the average cost per car handled by the lines in the district engaged exclusively in switching service was less in 1931 than in 1926. (R., 1252; Tr., 133.)

We contend that the action of the Commission in refusing to require the carriers to bring the cost study down to date, evidenced by their denial of the motions for the conduct of a proper cost study to reflect conditions subsequent to September, 1928, and their refusal to reopen the case for further hearing at which data upon which the Commission's decision was based in determining the level of interstate rates could be brought down to date, was an abuse

of discretion and that the order of the Commission was void and should be set aside.

The first decision of the Commission, dated July 31, 1931, (R., 33) was predicated almost entirely upon the result of the cost study made by certain of the respondents in 1927 as applied against a traffic test in September, 1926. The costs commented upon in the Commission's decision of July 3, 1933, (R., 137), were ascertained six years prior thereto and were applied against a traffic test more than seven years prior thereto.

The effect of a denial of a similar request for further hearing upon a Commission order was before the District Court for the Northern District of Illinois, specially constituted, in the case of *Atchison, Topeka & Santa Fe Railway Company, et al.* v. *United States*, 51 Fed. (2d) 510. A rehearing was sought before the Commission by railroads affected by an order reducing grain rates. In that case the order of the Commission dated July 1, 1930, was to go into effect on October 1, 1930. In September, 1930, the carriers asked for a rehearing, which was denied in November, 1930. A further petition for rehearing was presented on February 18, 1931, describing the situation then existing. The carriers in that case alleged that since the closing of the record before the Commission in September, 1928, there had been material and important changes in the operating, traffic and transportation conditions in the western district which affected adversely the revenues of the carriers and that regardless of the question of the validity and propriety of the order when made, it would no longer be valid and proper in the light of the existing circumstances. It was urged before the District Court that the Commission had erred in denying this second application on March 3, 1931. On April 10, 1931, the Commission made a supplemental report modifying its former decision and making the same effective

on June 30, 1931, but denying a further hearing. It was contended before the District Court that the order of the Commission was void because of the refusal of the petition for further hearing to show changes during the intervening two years and five months, but that court overruled the contention, saying (page 516):

> "If the Commission has no discretion to deny petitions for rehearing because of changed conditions, it would never arrive at a time when it might enter a lawful order. But the Commission has a discretion in the premises and even though we might believe it would have been wiser in the present case to have granted a rehearing, we have no right to substitute our judgment in that respect for that of the statutory body. Nor, in view of the character of rate orders and the nature of the Commission's duties, do we find any evidence of arbitrary abuse of discretion."

This Court, however, on appeal, 284 U. S. 248, 76 L. ed. 273, held that the denial by the Commission of a rehearing in 1931, sought upon the ground of changed economic conditions made upon a record which was closed in September, 1928, was not within the permitted range of the Commission's discretion, but a denial of right. In commenting on the question presented to it, this Court said (284 U. S. 248, 260-1, 76 L. ed. 273, 281):

> "It is plain that a record which was closed in September, 1928—relating to rates on a major description of the traffic of the carriers in a vast territory—cannot be regarded as representative of the conditions existing in 1931. That record pertains to a different economic era and furnishes no adequate criterion of present requirements."

Further, this Court said (284 U. S. 248, 262, 76 L. ed. 273, 281):

> "In the discharge of its duty, a fair hearing is a fundamental requirement. *Interstate Commerce Commission* v. *Louisville & N. R. Co.*, 227 U. S. 88, 91, 57

> L. ed. 431, 433, 33 S. Ct. 185. In the instant proceeding, the hearing accorded related to conditions which had been radically changed, and a hearing, suitably requested, which would have permitted the presentation of evidence relating to existing conditions, was denied. We think that this action was not within the permitted range of the Commission's discretion, but was a denial of right. The order of the Commission which was thus made effective, and the ensuing supplemental order, cannot be sustained."

The record in the *Grain case* was closed in September, 1928, and presumably covered the conditions existing at that time. The cost study in the instant case submitted in the record which closed in September, 1928, related to alleged costs developed in September, 1927, and was applied to a traffic test made in September, 1926. As thus applied those costs were two years old at the time the record closed in the first case. The motions for the further cost study presented to the Commission in January and February, 1932, were made four and one-half years after the cost study had been made and five and one-half years after the traffic test was made. The decision of the Commission on July 3, 1933, was made six years after the cost study and nearly seven years subsequent to the traffic test. No evidence that the interstate rates were reasonable relates to any later date. The petition for further hearing to bring the record down to date was filed August 15, 1933, challenging the validity of the order made upon such testimony.

Having in mind the action of this Court in reversing and setting aside the order of the Commission in the *Grain case*, because of the refusal to grant the petition of the carriers to bring the record down to date over an intervening period of two and one-half years, it would follow that the order herein is void because of the refusal of the Commission to require the carriers to make a cost study in this case, bring-

ing the record down to date over an intervening period of four and one-half years. Here the order of the Commission strikes down the power of the sovereign states of Illinois and Indiana, notwithstanding their demand for a hearing at which the facts showing changed conditions could be made a part of the record.

There is nothing in the decision of this court in *U. S.* v. *Northern Pacific Railroad Co.*, 288 U. S. 490, 77 L. ed. 914, which in any wise weakens the force of the decision in the *Grain case*. In the Northern Pacific case this court did not consider the merits of the application for rehearing because in that case the carriers' lack of diligence in bringing the matter to the Commission's attention deprived them of any equity to complain of the refusal of their petition. This court held that the denial of a rehearing "in view of this delay, was not such an abuse of discretion as would warrant setting aside the order."

The Commission in the instant case refused to heed plaintiffs' request that a record embracing a new cost study be made which would reflect present day conditions. It was urged in the court below that the cost study of record required the expenditure of about $250,000 and as one ground for not having a new and a representative cost study that the additional cost would have been $1,000,000. The fact that an accurate and correct cost study might be extremely expensive is no justification for the use of a less expensive cost study which does not reflect current facts. The burden of proof was upon the carriers to support by proper evidence the finding sought from the Commission, and if, in discharging that burden, they expected to and did rely on a cost study, it was incumbent upon them, without regard to the cost of securing same, to furnish a reasonably accurate and representative cost study which portrayed the true situation. If the cost of

such a study was prohibitive, then it goes without saying that it devolved upon them to find some other method of demonstrating the essential facts. Certainly they can not now be heard to say that, because proper evidence is too expensive, the Commission has a right to rely upon improper, inaccurate and, consequently, immaterial evidence. They might as well have dispensed with the so-called cost study entirely and guessed at the figures, and thereby saved the expense of the pseudo cost study. It is fundamental that whatever is worth doing at all is worth doing right. In *Atchison, Topeka & Santa Fe R. Co.* v. *U. S., supra,* in which the carriers sought to enjoin an order of the Commission, it was urged by the Commission that reopening would have meant further lengthening the proceedings, but this Court stated, at page 262:

> "And the prospect that a hearing may be long does not justify its denial if it is required by the essential demands of justice."

So we insist that having suitably requested further hearing to obtain cost studies by all of the carriers reflecting conditions in 1932, it was error by the Commission to deny that further hearing. The denial was not within the permitted range of the Commission's discretion but was a denial of right. For that reason alone the Commission's order of July 3, 1933, should be set aside as void. Elsewhere we discuss the invalidity of the cost study and the reasons why this court should hold that it constituted no evidence upon which the Commission could find that rates of 3 cents for 1-line, 3.5 cents for 2-line, and 4 cents for 3-or-more-line hauls were justified as reasonable maximum rates for interstate application.

IV.

The order of the Commission is void because it is not supported by the necessary subordinate findings.

(a) THERE IS NO PROPER FINDING THAT THE INCREASED INTERSTATE RATES WOULD BE OR ARE REASONABLE PER SE.

That an order of the Commission is in proper form does not necessarily mean that it is a valid order. An order to be valid must be accompanied by a report in which it is shown by appropriate findings of the Commission the extent to which the rates dealt with are in violation of the statute. It must be further shown by appropriate findings that the rates compelled by the order are required by and would be in conformity with the statute.

In *Beaumont, S. L. & W. R. Co.* v. *United States,* 282 U. S. 74, 86, this Court said:

> "Complete statements by the Commission showing the grounds upon which its determinations rest are quite as necessary as are opinions of lower courts setting forth the reasons on which they base their decisions in cases analogous to this."

The character of the subordinate findings which are necessary to support a given order depends upon the character of the power which the Commission is exercising. In this case, considering as we must both the *First* and the *Second Reports,* the Commission purports to be exercising the power conferred upon it to prescribe maximum reasonable rates which conform to Section 1 of the Act, and also the power conferred upon it to require the maintenance of intrastate rates which shall not unjustly discriminate against interstate commerce, in conformity with Section 13(4) of the Act.

In exercising its power to prescribe rates which conform to section 1 of the Act, it was necessary for the Commission

to find definitely that the rates prescribed or approved would be just and reasonable. Such a finding must necessarily be made as to the interstate rates before the Commission can prescribe such interstate rates as the minimum rates on intrastate traffic. This is so because the whole foundation of the case, considered as a whole, is in a finding that the rates approved on interstate traffic in the *First Report* are just and reasonable rates. In the absence of that finding and of the increased interstate rates which resulted therefrom, there would be no occasion for the proceeding which culminated in the *Second Report*. Stated differently, it is because the Commission came to the conclusion and found that, under the evidence, the carriers had justified the reasonableness of the increased interstate rates and of its belief, which as elsewhere shown herein is unsupported by the evidence, that what is reasonable for interstate traffic in the district would also be reasonable for intrastate traffic, that it entered the order complained of requiring the intrastate rates to be increased to the same amounts as were contemporaneously applicable on interstate traffic.

This Court in *United States* v. *Louisiana*, 78 L. Ed. Adv. Ops. 50, speaking of the preliminary finding as to the interstate rates which the Commission used as its yardstick for determining minimum intrastate rates observed that:

> "* * * the ultimate finding that the rates as generally applied are reasonable, supported by evidence * * * complies with the statute."

The plain implication is that if the ultimate finding as to the reasonableness of the interstate rates is not made and is not supported by the evidence, the statute is not complied with.

In so far as the reasonableness of the interstate rates is concerned, the Commission in its *First Report* expressed

its finding in the following language (R., 75-6, emphasis ours):

> "The ascertainment of the cost of performing a particular service is always beset with serious difficulties, and this is particularly true in connection with switching costs within an area as congested as the Chicago switching district, which presents a complicated network of rail lines probably not equaled in any other section of the country. The cost study presented herein is perhaps more exhaustive than any heretofore undertaken in any proceeding involving switching charges. Considering these facts and *the further fact that all of the parties, both shippers and carriers, were practically unanimous in contending for the establishment of an all-commodity basis to apply throughout the Chicago switching district,* it appears that the rates proposed for the one, two, and three-or-more line movements are not excessive. We find:
>
> (*a*) That the rates proposed of 3 cents per 100 pounds for 1-line hauls, 3.5 cents for 2-line hauls, and 4 cents for 3-or-more line hauls, carload minimum 60,000 pounds, within the Chicago switching district as defined in Appendix A, will not be unreasonable for the future for application on all of the commodities switched within the district, except railway equipment on its own wheels."

We assert that the finding just quoted is not in proper *form* in that, by its own terms, it is predicated on and qualified by an alleged agreement by certain unnamed shippers that the switching rates within the Chicago district should be the same in amount on all commodities. The precise matter, however, with which the Commission was dealing was the amount of the switching charge and, even if there had been an agreement between all shippers as to the manner in which a reasonable switching charge should be applied; that agreement as to manner of application does not support a finding as to the amount of the charge.

Furthermore, the State Commissions, in administering the powers conferred upon them by the sovereign states of

Illinois and Indiana, have held that the increases proposed in intrastate rates in effect at the time of the *First Report* had not been justified. The two State Commissions, who are appellants in this proceeding, deny that an agreement by shippers as to the manner in which rates should be applied can serve as the basis for forcing upon intrastate commerce, rates higher than the State Commissions have found would be reasonable.

Consequently, we assert that at the outset the order complained of must be held void because it is not supported by a proper finding directed to the reasonableness of the *maximum* interstate rates which, in the *Second Report,* were prescribed as the *minimum* for intrastate commerce.

However, even if we were to admit that the finding as to the reasonableness of the interstate rates is valid in form, we later show, under point VI-(a) that the finding so made is unsupported by the evidence.

Furthermore, again admitting for the sake of the argument that the finding as to reasonableness of the interstate rates is proper in form, we shall now proceed to show that the Commission failed to make, in either the *First* or *Second Reports,* certain other findings which are necessary prerequisites to the validity of a section 13(4) order prescribing as minimum on intrastate traffic rates theretofore approved as maximum on interstate traffic.

(b) THERE IS NO FINDING THAT THE INTRASTATE TRAFFIC UPON WHICH THE RATES SUBJECT TO THE ORDER WERE ASSESSED IS OF A LIKE KIND AND SIMILAR TO THE INTERSTATE TRAFFIC IN RESPECT TO THE CONDITIONS UNDER WHICH THE SWITCHING SERVICE IS RENDERED.

The matter with which we are immediately concerned is unjust discrimination. The phrase "unjust discrimination" has been a part of the Interstate Commerce Act since 1887, being used in Section 2 (49 U. S. C., Sec. 2.) In the

absence of any clear showing to the contrary, it must be assumed that when the same phrase is used in Section 13, paragraph 4, which was made a part of the Interstate Commerce Act by the Transportation Act of 1920, it was intended to have the same definition and interpretation as had theretofore been made of the phrase in Section 2.

In many cases, both by the Commission and by the courts, the term "unjust discrimination" used in Section 2, and the term "preference and prejudice" used in Section 3, have been used interchangeably. The underlying thought in unjust discrimination is different treatment, when, under the circumstances and conditions existing, there should be no difference in treatment.

The language of the statute in Section 2 sets forth as necessary factors in unjust discrimination: (a) a like and contemporaneous service in the transportation (b) of a like kind of traffic, (c) under substantially similar circumstances and conditions; unless all three of these factors exist in a particular case there is no "unjust discrimination" shown.

At page 711 of the *First Report* (R., 75) under the heading "Des Plaines, Ill.," the Commission said:

> "A large percentage of the traffic under consideration is intrastate in character, but the record does not disclose any difference in the conditions surrounding the handling of the interstate and intrastate movements. In the hope that both the Illinois Commerce Commission and the Public Service Commission of Indiana will bring their rates in harmony with the conclusions herein, no specific finding or order with regard to intrastate rates will be entered at this time."

If it be argued that the matter above quoted is the equivalent of a finding that the intrastate traffic subject to the order is like the interstate traffic, we point to the fact that the Commission itself specifically declined, in its *First Report*, to make any finding one way or the other.

A statement that "the record does not disclose any difference" is wholly negative and is not the equivalent of finding affirmatively that the service on intrastate traffic is like and similar to the service on interstate traffic. In this case the Commission, purporting to act under authority of the statute, is overriding the well-considered action of the duly constituted regulatory bodies in the States of Illinois and Indiana. Certainly in such case the order can not be supported by negative statements of the character just quoted.

Furthermore, it will be recalled that, although requested, by the carriers so to do, the Commission declined to make a Section 13 order based on the evidence before it and the findings made in the *First Report*. By that action the Commission embarked upon a course of action which required it to incorporate in the *Second Report* such findings as under the statute must be made in support of the order entered.

There are no findings in the *Second Report* which bring the disparities between intrastate and interstate rates, which were the subject of investigation, within the definition of unjust discrimination contained in Section 2. The nearest approach to it is the finding on page 118 of the *Second Report* (R., 166), which reads:

> "We further find that the transportation conditions throughout the Chicago switching district are substantially similar;"

In the light of the facts in this case, that finding means nothing. To find that conditions throughout the entire district are substantially similar is not the equivalent of finding that a single-line haul of 6.3 miles in intrastate commerce in Indiana is like a 15-mile haul in interstate commerce and is performed under substantially similar circumstances and conditions. The finding required is not one

directed to general conditions throughout the district, but rather is directed to conditions surrounding *intra*-state *service* as compared with or distinguished from the conditions surrounding *inter*-state *service*.

There is no finding at all that the intrastate traffic is like the interstate traffic in respect to the commodities carried, and obviously, from the facts recited in our Statement of the Case (pp. 38-9 above), there was no evidence upon which such a finding could be predicated.

There is no finding that the carriers which maintain the approved level of interstate rates are the same carriers who contemporaneously maintain a different level of intrastate rates. Here again, from the facts heretofore recited, it is obvious that no such a finding could be made, particularly when 1-line hauls are considered, since 20 of the carriers in the district do not operate across the state line and for such carriers it would be physically impossible to engage in 1-line interstate traffic.

(c) THERE IS NO FINDING THAT AN INCREASE IN THE INTRASTATE RATES WILL PROVIDE ADDITIONAL INCOME FOR THE CARRIERS.

A second subordinate finding which is necessary to support an order under Section 13(4), particularly where, as here, the Commission states that there is no basis for finding unjust discrimination against either persons or localities, is that the compelled increase in the intrastate rates will augment the net revenues of the carriers.

Before undertaking a discussion of law in respect to this point it is desirable to consider briefly the two types of discrimination with which the Commission is empowered to deal under Section 13 and the character of subordinate findings which are necessary, depending upon the type of dis-

crimination involved. If the discrimination is between persons and localities there is no need for the Commission to go farther than a finding that there exists a difference in rates and charges which is not justified by difference in conditions. In such a case the Commission is not concerned with the results of the establishment of a proper rate relation upon the income of the carrier; that is, even though increased intrastate rates might produce less income than the rates assailed, the interstate shipper is entitled to the parity of rates, transportation circumstances and conditions considered, which the law guarantees him.

However, when the discrimination found to exist is confined solely to that between intrastate and interstate commerce, an entirely different situation is presented. In such a case, even though it is found that there is a difference in rates which is not justified by the difference in the conditions surrounding the service, it is still necessary for the Commission to consider and pass upon the matter of relationship of rates to net income. In such a case, unless there is substantial evidence which proves that the prescription of equal rates, services considered, would provide additional income for the carriers, and unless a proper finding predicated on such evidence is made, there is no support for a Section 13 order.

In *Florida* v. *United States*, 282 U. S. 194, this Court set aside a Section 13 order entered by the Commission in *Georgia Public Service Commission* v. *A. C. L. R. Co.*, 146 I. C. C. 717, because of the absence of a finding of the character just mentioned, the Court saying (page 214) (emphasis ours):

> "In considering the authority of the Commission to enter the state field and to change a scale of intrastate rates in the interest of the carrier's revenue, the question is that of the relation of rates to *income*. The raising of rates does not necessarily increase revenue. It

may in particular localities reduce revenue instead of increasing it, by discouraging patronage.'"*

and further:

"The Commission made no findings as to the revenue which had been derived by the carrier from the traffic in question, or which could reasonably be expected under the increased rates, or that the alteration of the intrastate rates would produce, or was likely to produce, *additional income* necessary to prevent an undue burden upon the carrier's interstate revenues and to maintain an adequate transportation service.

The question is not merely one of the absence of elaboration or of a suitably complete statement of the grounds of the Commission's determination, to the importance of which this court has recently adverted (*Beaumont, S. L. & W. R. Co.* v. *United States*, decided November 24, 1930, 282 U. S. 74, *ante*, 221, 51 S. Ct., 1), but of the lack of the basic or essential findings required to support the Commission's order. In the absence of such findings, we are not called upon to examine the evidence in order to resolve opposing contentions as to what it shows or to spell out and state such conclusions of fact as it may permit."

We would particularly emphasize the use by the Court of the phrase "additional income."

In *United States* v. *Louisiana*, 78 L. Ed. Adv. Ops. 50, 56, hereinafter referred to as the *Louisiana Surcharge Case*, there was involved a Section 13 order of the Commission prescribing the same surcharges on intrastate traffic as had been previously prescribed as an emergency revenue matter on interstate traffic. This Court, however, observing that the form in which the Commission cast its findings was not to be commended, said:

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*"In the *Florida Fertilizer Case*, 151 Inters. Com. Rep. 602, the Interstate Commerce Commission, in refusing to order an increase in the Florida intrastate rates on fertilizer, said: 'Furthermore, it is not certain that if the Florida intrastate rates were increased to the interstate level, additional revenue would accrue to the carriers, for if the prophesies of the interior plants and of the Florida commission are justified, practically all shipments would be made from the ports with the result that the total charges would probably be no greater than they now are'."

> "the report, read as a whole, sufficiently expresses the conclusion of the Commission, based upon supporting data, including estimates of experienced railroad traffic men, to which the report refers, that the probability of increased revenue was sufficiently great to make the increase of rates a reasonable exercise of sound managerial judgment. This, we think, meets the requirements of the statute."

While at this point we are discussing the matter of findings and not the evidence, we call attention to the fact that under point VI (e) below we deal with the lack of evidence which would justify a conclusion as to an increment in income from increased intrastate rates, pointing out that there was not a single experienced railroad traffic man who attempted to deal with the subject.

The finding of the Commission in the *Second Report* reads (R., 166):

> "While the evidence shows that the existing competition by motor truck is material, and indicates that this means of transportation will be utilized to a greater extent if the intrastate rates are increased, and that therefore, some additional tonnage in all probability will be lost to trucks, or diverted to barge and pipeline movement, the record nevertheless is convincing that the carriers will derive a substantial increase in revenue if the intrastate rates are increased to the interstate basis, and we so find."

Many of the carriers' expenses consist of overhead items, which will not vary with any direct relation to the volume of traffic. It can easily be that the gross revenue *on a particular shipment* will be increased, but that a diminution of the volume handled will result not only in loss of revenues on lost traffic but in such an increase in unit costs on remaining traffic that the carrier will actually have less net money under increased rates than under present rates.

Moreover, the expression above quoted from the Commission's report "and we so find" is a mere conclusion. There

is an utter absence of findings of fact upon which the conclusion could be based.

In the *Florida Case, supra,* the subordinate findings, which this Court held were insufficient to support the order, were described by this Court as follows (page 213):

> "The Commission made a comparison of 'present interstate and intrastate rates and the proposed interstate rates from north Florida in cents per 100 pounds, and the earnings thereunder per car of 50,000 pounds for distances to 170 miles.' The 'earnings' thus set forth were merely the amounts receivable per car for the given number of pounds under the rates for the prescribed distance'."

At page 117 of the *Second Report* (R., 165), the Commission cursorily mentions in one paragraph the evidence of shippers dealing with the prospective diversion of traffic if the intrastate rates be increased and states, (emphasis ours):

> "we are *not convinced* that any substantial proportion of the traffic now moving by rail intrastate will be diverted to other forms of transportation if the rates found reasonable for interstate traffic are applied thereto."

This finding is in substance in the same language as that used by the Commission in the *Georgia Public Service Commission Case* report at page 724, where the Commission said, (emphasis ours):

> "The evidence *is not convincing* that logs could not or would not move from Florida to Georgia if the interstate rates and the Florida intrastate rates were on the same level."

The finding last quoted was held by this Court not to be sufficient to meet the requirements of the statute.

In *State of Florida* v. *United States,* No. 342, October Term, 1933, decided April 2, 1934, Mr. Chief Justice Hughes restated the holding of this Court in the *Florida Case* (282 U. S. 194) as follows (emphasis ours):

> "We observed * * * that in considering the authority of the Commission to enter the state field and to change a scale of intrastate rates in the interest of the carrier's revenue, the question was that of the relation of rates to *income*. But to support the order then under review, the Commission had made no findings as to the revenue which had been derived by the carrier from the traffic in question, or which could reasonably be expected under the increased rates, or that the alteration of the intrastate rates would produce, or was likely to produce, *additional income* necessary to prevent an undue burden upon the carrier's interstate revenues and to maintain an adequate transportation service."

It will be noted that, in listing the findings required, this Court referred to at least three, *i. e.*, (1) a finding as to the revenue which had been derived under former rates, (2) a finding as to the revenue which could reasonably be expected under increased intrastate rates, and (3) a finding that the increase in the intrastate rates was likely to produce additional *income* which would remove a burden from the carriers' interstate revenues. It is true that in the *Second Report* in the instant case the Commission comments upon exhibits of carriers which purport to deal with revenues under former as well as increased intrastate rates. There is, however, no definite finding by the Commission that the showing as to revenues made in the carriers' exhibits is a true showing. In fact, the Commission states that the showing of the carriers is predicated on the assumption that all the intrastate traffic would continue to move by rail at the higher rates, and as to this the Commission finds. (R., 165):

> "This is not a fair assumption."

The finding just quoted should be sufficient to dispose of any question as to whether or not the Commission made any finding as to revenue which supports the order.

But it should be especially noted that, in addition to the

requirement of findings of additional revenues, Mr. Chief Justice Hughes distinctly points to the necessity for an additional specific finding relating to the matter of *income*. The *Second Report* of the Commission will be searched in vain for any finding in which the word "income" is used or in which it is stated that additional income will be received so as to remove a burden from the carriers' interstate revenues.

(d) THERE IS NO FINDING THAT THE INTRASTATE RATES AS IN EFFECT PRIOR TO THE ORDER OF THE COMMISSION WERE LESS THAN MAXIMUM REASONABLE RATES.

Another finding which is a necessary prerequisite in support of a valid Section 13 (4) order is that the intrastate rates, the subject of the investigation, are less than reasonable rates, all conditions and circumstances of the transportation considered. As the Commission said in *Virginia Corporation Commission* v. *A. & R. R. Co.*, 136 I. C. C. 173, 180:

> "Plainly we cannot require intrastate rates to be raised above a maximum reasonable level in order to cure a disparity with interstate rates, and where the intrastate rates have been fixed, as they have been here, by the order of a State commission, they can not be increased by the carriers without an order from us."

The same principle is enunciated in *Georgia Public Service Commission* v. *U. S.*, 283 U. S. 765, 770, and in the *Louisiana Surcharge Case*.

There is no finding in the *Second Report* which even touches upon the question of whether the intrastate rates which were the subject of the investigation were less than reasonable or whether the increased intrastate rates would be reasonable. It is true that in the *First Report* there was a finding that increased rates would be reasonable for application to interstate traffic.

There was, however, no affirmative finding in that report that the rates approved as reasonable for interstate traffic would be reasonable when applied to intrastate traffic. Such a finding in the *First Report* would have been a superfluity, inasmuch as the order entered with that report was not addressed to intrastate rates or commerce. The Commission did say in its *First Report* (R. 75):

> "* * * * the record does not disclose any difference in the conditions surrounding the handling of the interstate and intrastate movements."

We have heretofore pointed out that that finding is not the equivalent of an affirmative finding that the intrastate traffic subject to the order is like the interstate traffic within the district. For the same reasons there can not be implied from the statement just quoted a finding of reasonableness directed to the intrastate rates.

In the *Second Report* itself there is no statement by the Commission whatsoever as to the reasonableness or unreasonableness of the intrastate rates. The findings in the *First Report*, confined as they were to interstate commerce, can not be incorporated in the *Second Report* and applied to intrastate commerce except by an affirmative finding that the intrastate traffic is similar, in all respects, to the interstate traffic. The order complained of, being unsupported by a finding as to the reasonableness of the intrastate rates, is void and must be set aside.

It should be made plain that the deficiency in the *Second Report* to which we here point is not within the purview of what this Court said in approving a Section 13 order of the Commission in the *Louisiana Surcharge Case*. In that case the order involved required that there be applied the same surcharges on certain intrastate traffic in Louisiana as had been approved and found reasonable by the Commission for application to interstate traffic in the *Fifteen Per Cent*

Case, 1931, 178 I. C. C. 539, 179 I. C. C. 215. It was argued that the order in that case was invalid because of the absence from the Commission's report of a finding that the application of surcharges to intrastate traffic would result in just and reasonable rates thereon. This Court held that such a finding in a proceeding initiated by the Commission under Section 15a of the Act (approved February 28, 1920, U. S. C. Title 49, Section 15a), was not necessary where the Commission in the first instance made such inquiry and investigation as would enable it to say that the prescribed increases when applied to rates generally would not exceed reasonable maximum. It was further held that in a Section 15a proceeding it was not necessary for the Commission to deal with individual rates. The Court noted in its report dealing with the said rates under Section 13, that the Commission (p. 55) "incorporated the findings bearing on the reasonableness of the increased interstate rates made in the *Fifteen Per Cent Case, 1931.*" It was further found that there was no greater necessity for dealing with individual rates in the state proceeding than there was in the interstate proceeding.

This case, however, is not like the *Louisiana Surcharge Case.* In the first place, the rates there involved did not attach to a particular service, while the contrary is true in the instant case. In that case a uniform surcharge was applied to specified commodities and the general revenue needs of the carriers as a whole, without regard to particular costs on particular traffic, was the prime consideration. In this case the only foundation for any increase in rates, either state or interstate, is found in the *costs* which it is alleged attach to the particular traffic under consideration.

In the second place, in that case the Commission did incorporate in its report in the Section 13 proceeding by specific reference, as this Court found, the finding that the sur-

charges would provide reasonable rates. There is no such incorporation of a prior finding in the Commission's *Second Report* in this case.

If by a strained implication there can be read into the *Second Report*, a finding that intrastate switching rates are less than reasonable, the question then arises as to whether or not that finding is supported by the evidence. With that question we deal hereafter under point VI-a.

(e) THERE IS NO FINDING WHICH DEFINES WHAT INTERSTATE COMMERCE IS BEING DISCRIMINATED AGAINST OR IN WHAT MANNER THE ALLEGED UNJUST DISCRIMINATION OCCURS IN FACT.

The *Second Report* likewise fails to contain a finding defining the interstate commerce which is unjustly discriminated against and burdened by the intrastate switching rates. If it be argued that the burden is upon interstate commerce generally, our reply is that under Section 15a of the Act as it now reads the Commission is no longer empowered to deal with the interstate commerce of the country generally in proceedings brought under Section 13 of the Act, but must confine itself to the interstate commerce of the particular carrier or carriers which are complained of as maintaining the intrastate rate structure which imposes the burden.

If the broad term "interstate commerce" is construed as meaning traffic moving on interstate rates within the switching district, then there is a clear inconsistency because in the same sentence the Commission found that there was no undue prejudice and disadvantage to persons engaged in interstate commerce and no undue prejudice and disadvantage to the localities engaged in such commerce. Within an area so limited as the Chicago switching district it is inconceivable that there could be unjust discrimination against commerce without

there being at the same time unjust discrimination against persons and localities. This is so because with any kind of discrimination there must be a disparity in charges which is not justified by a corresponding difference in transportation circumstances and conditions. If the intrastate rates subject to the order gave no undue advantage to an intrastate shipper or locality with a corresponding disadvantage to an interstate shipper or locality it must follow that there was no unjust discrimination against interstate commerce, considered in the abstract.

Furthermore, there are nowhere in the report findings which define, or particularize the undue burden on interstate commerce which results from lower rates on intrastate than on interstate traffic in the district in the states of Illinois and Indiana. It is true that in Exhibit 105, from which is taken the table on page 114 of the *Second Report* (R., 162), it is shown that for one week in January of 1932 the portion of the whole traffic within the district which moved in *interstate* commerce was less by approximately 4 per cent than the portion, in terms of the whole, which moved in one week of November of 1931, the November week being prior to the increase in the interstate rates and the January week subsequent thereto. The carriers apparently presented the exhibit to prove that the increase in interstate rates without a corresponding increase in state rates has *per se* occasioned a reduction in the relative volume of interstate commerce.

Whatever may have been the purpose for which the exhibit mentioned was introduced, the Commission did not predicate any finding thereon as to discrimination in fact.

In view of the character of the case, the finding which we would expect the Commission to make as to discrimination in fact would be one in which it would be stated in substance that costs and conditions of transportation consid-

ered, the intrastate rates made subject to the order provided less profit to the carriers than the interstate rates, as increased under the *First Report.* It is significant that there is nothing in the report from which such a finding can even be implied.

The *Second Report* leaves us in the dark as to the unjust discrimination in fact which the Commission thought existed.

(f) THERE IS NO FINDING WHICH SEPARATES THE INTRASTATE AND INTERSTATE PROPERTY, REVENUES AND EXPENSES OF THE CARRIERS SO AS TO MAKE IT POSSIBLE TO COMPARE REVENUE WITH COSTS FOR INTRASTATE SWITCHING TRAFFIC CONSIDERED SEPARATELY FROM INTERSTATE SWITCHING TRAFFIC.

The final and fatal deficiency insofar as subordinate findings is concerned, is in the failure of the Commission to find that the intrastate switching rates, when compared with costs of intrastate switching traffic *separately determined and considered,* provide a lesser margin of profit to the carriers than the interstate switching rates when compared with costs of interstate switching traffic *separately determined and considered.*

The Commission definitely found (R., 166) that there was no proof of any undue preference or advantage to persons or localities in intrastate commerce or any undue prejudice against or disadvantage to persons or localities in interstate commerce. Its affirmative finding was limited to the single conclusion that the maintenance of such lower intrastate rates did result and would for the future result in unjust discrimination against interstate commerce. Commerce in the abstract, however, cannot be discriminated and conditions surrounding the transportation considered, against, unless the intrastate commerce, all circumstances is treated more favorably than interstate commerce. Still

dealing with commerce in the abstract, such more favorable treatment, if it exists, must be susceptible of being measured by the relation of revenues to costs. The Commission must find that there is a lesser margin between revenue and costs on intrastate traffic than between revenues and costs on interstate traffic as a prerequisite to finding unjust discrimination against interstate commerce. In the absence of such a prerequisite finding, there is no basis for a Section 13 (4) order predicated solely on unjust discrimination against interstate commerce.

The *Second Report* of the Commission can be searched in vain for any finding which attempts to determine, first, for intrastate traffic, and then separately for interstate traffic, the relation of revenues under any set of rates to the costs as they may attach separately to the intrastate and interstate traffic. Therefore, in the absence of such a finding, the order is without support and must be declared void.

This principle was clearly expressed by this court in *Smith* v. *Illinois Bell Telephone Co.*, 282 U. S. 133, in which was involved an order of the Illinois Commerce Commission prescribing rates for intrastate telephone service in the City of Chicago. One ground asserted by appellants against the decree therein was the failure to make a definite and complete allocation of costs and revenue as between intrastate and interstate business. This court held that a finding making such an allocation was a necessary requisite to a valid decision, saying at page 148:

> "The separation of the intrastate and interstate property, revenues and expenses of the company is important not simply as a theoretical allocation to two branches of the business. It is essential to the appropriate recognition of the competent governmental authority in each field of regulation. * * *"

and on page 149:

> "The proper regulation of rates can be had only by

maintaining the limits of state and federal jurisdiction, and this can not be accomplished unless there are findings of fact underlying the conclusions reached with respect to the exercise of each authority. In view of the questions presented in this case, the validity of the order of the state commission can be suitably tested only by an appropriate determination of the value of the property employed in the intrastate business and of the compensation receivable for the intrastate service under the rates prescribed. *Minnesota Rate Cases* (*Simpson* v. *Shepard*) 230 U. S. 352, 435, 57 L. ed. 1511, 1556, 48 L. R. A. (N. S.) 1151, 33 S. Ct. 729, Ann. Ca. 1916A, 18. As to the value of that property, and as to the revenue and expenses incident to that business, separately considered, there should be specific findings. *Railroad Commission* v. *Maxcy*, 281 U. S. 82, 83, 74 L. ed. 717, 718, 50 S. Ct. 228. * * *"

and again on page 151:

"It is obvious that, unless an apportionment is made, the intrastate service to which the exchange property is allocated will bear an undue burden—to what extent is a matter of controversy."

The instant case is also one in which there must be a finding making an apportionment of *costs* as well as of revenues before the Commission can come to any valid conclusion as to whether state traffic is bearing its fair share of the burden. Otherwise there is no yardstick by which to measure what is fair for state traffic on the one hand and for interstate traffic on the other.

(g) THE EARLIER DECISIONS OF THIS COURT INVOLVING SECTION 13 (4) ORDERS ARE NOT SIMILAR IN THEIR FACTS TO THE INSTANT CASE.

It was argued below by counsel for the United States and the Commission that under the decisions of this court in *Georgia Public Service Commission* v. *U. S.*, 283 U. S. 765; *Alabama* v. *U. S.*, 283 U. S. 776; *Louisiana Public Service Commission* v. *T. & N. O. R. Co.*, 284 U. S. 125 and

Wisconsin Railroad Commission v. *C. B. & Q. R. Co.*, 257 U. S. 563, it is not necessary in a case of this character, for the Commission to make the findings of the nature commented upon in the various subheadings under Point IV above. The cases cited, as well as the *Louisiana Surcharge Case*, are not, however, like the instant case. In the *Georgia Case*, the *Alabama Case*, and the *Louisiana Surcharge Case*, the Section 13 orders contained a definite and specific finding as to discrimination between persons and localities. In such cases the order of the Commission did not need to be buttressed by subordinate findings dealing with prospective net income under increased rates.

The *Louisiana Surcharge Case* was a proceeding wholly under Section 15a of the Act; it involved a uniform emergency surcharge for revenue purposes, and this court found that there was sufficient mention in the Commission's decision of evidence as to added revenues to support the order.

A very important difference between the cases cited and the instant case, particularly insofar as the necessity of findings that the state and interstate traffic are like traffic and that the transportation services performed thereon are under similar circumstances and conditions, rests in the character of the rates involved. In all of the cases mentioned, including the *Florida Case*, the Commission was measuring minimum rates on intrastate traffic by a *mileage scale* of rates on interstate traffic. That in itself rendered it unnecessary for the Commission to examine at any length the possibility of there being a difference between state and interstate traffic in respect to transportation circumstances and conditions. Take the *Wisconsin Case*, for example, in which this court unheld a Section 13 order of the Commission which required that the fare for each mile travelled be 3.6 cents for an intrastate ride, as well as for an interstate ride, part of the latter taking

place within the State of Wisconsin. It is plain on the face of it that when two passengers enter a coach at Milwaukee, Wisconsin, one of them proposing to get off at Kenosha, Wisconsin, and the other at Chicago, Illinois, the service each receives for each mile travelled until the intrastate passenger detrains is identical in every respect. It goes without saying that, being a mileage scale case, the interstate passenger got a greater service outside the state than the intrastate passenger who got off at Kenosha, but that was also to be paid for at a continuation of the mileage scale rate. However, for the ride from Milwaukee to Kenosha during which both passengers were receiving the same service, there can be no question but that, for each of those miles, the cost of transportation, whatever it may be, which attaches to the service rendered is the same per passenger mile. In such a case it necessarily follows that, as related to cost, there is a discrimination as between intrastate traffic, on the one hand, and interstate traffic, on the other, unless the charge for each mile of service is made the same. No cost study, revenue study and no analysis of transportation conditions is required to make this evident. Stated differently, it is plain that the prescription of an equal rate per mile was required in order that the intrastate passenger might contribute per unit of similar service as much toward costs and profits as the interstate passenger.

In the light of the extreme differences between the hauls in this case, for which the Commission has attempted to compel common rates, no similar conclusion can be here drawn.

Furthermore, the fact that the rates involved in the cases just discussed were mileage scale rate cases, rendered it unnecessary for the Commission to make a finding apportioning costs of transportation, investment, etc., as be-

tween intrastate and interstate traffic. Where rates are measured by distance, such rates are thereby proportioned exactly to the service rendered and to the cost of transportation.

V.

The order of the Commission is void because it is indefinite and lacks precision in respect to the carriers subjected to its terms.

By its terms (R., 168b) the order complained of required the respondents before the Commission *"according as they participate in the transportation"* to establish and maintain switching rates on intrastate traffic in the district which should not be less than the rates contemporaneously applied by *"said carriers"* to the transportation *"by them"* of all commodities in interstate switching service. The interstate rates thus fixed as the minima for intrastate traffic were those approved by the Commission in its *First Report*. In that report three different rate bases were provided, dependent upon the number of carriers involved in the service. If but one carrier performed the service the rate approved was 3 cents per hundred pounds, if two carriers joined in performing the service 3.5 cents per hundred pounds, and if more than two carriers joined in performing the service 4 cents per hundred pounds.

The evidence shows, as is stated in the Statement of the Case, that 20 of the respondents before the Commission have no rails in the district outside of the State of Illinois. Consequently, in so far as said respondents are concerned, it is physically impossible for them to engage in a one-line switching haul in interstate commerce, and they do not have in their tariffs an interstate rate applicable to a one-line haul.

As the order reads there is nothing which requires the said 20 carriers to increase the intrastate rates for one-line hauls as to which the Illinois Commission prohibited an increase. If the Commission intended, as it has been alleged it did, to require said carriers to increase their one-line intrastate rates, it could only be done by an order specifying such carriers by terms other than those contained in the order assailed. The lack of such a specification makes the order indefinite and consequently void.

What has just been said likewise applies to rates for two-line hauls in intrastate commerce maintained by carriers which do not have lines in the district outside of the State of Illinois. An example of such a rate is one maintained from a point on the Chicago & North Western Railway to a point on the Chicago, Burlington & Quincy Railroad. In such a case only the Chicago & North Western and the Chicago, Burlington & Quincy participate in the two-line transportation and the transportation is intrastate. The two carriers just named cannot join each other in a rate for a two-line switching haul in interstate commerce in the district. Consequently, according to the terms of the order, no minimum rate is prescribed for an intrastate two-line haul in which the Chicago & North Western and the Chicago, Burlington & Quincy Railroads participate.

The same situation likewise obtains to any three-line haul in which the participating carriers are confined to those whose rails in the district are located wholly within the State of Illinois.

In *Texas & Pacific Ry. Co.* v. *United States*, 289 U. S. 627, this Court, in dealing with the order directed to the relation of rates under Section 3 of the Act, held that there must be a common control and responsibility for both the

rate alleged to be unduly prejudicial, as well as the rate alleged to be unduly preferential, before the Commission could issue a valid rate relation order. The observance of the principle of law enunciated in that decision presumably explains the indefiniteness of the order complained of. The Commission was well aware that, in requiring the removal of unjust discrimination, it could not enter a valid order unless the carrier which maintained and charged the rate found to be unjustly discriminatory against interstate commerce likewise maintained and charged the rate alleged to unjustly discriminate in favor of intrastate commerce. The Commission consequently took care to enter an order which in form does not contravene the principle enunciated in the *Texas & Pacific Case*. As a result, however, the order is indefinite when it is sought to be applied to the above described rates of the Chicago and North Western, the Chicago, Burlington & Quincy and the other lines which do not operate rails within the district across the state line.

If it be suggested that the cure for the indefiniteness and lack of precision in the order is by way of application to the Commission for a clarifying order, we point out that such an application raising this precise point was made by the petition of these appellants dated August 15, 1933 (R., 181), and that the Commission by its order of October 4, 1933, denied that petition.

VI.

The order of the Commission is void because there was no evidence upon which the Commission could predicate findings which are necessary to support an order under Section 13 (4) of the Act.

We do not deny that the Commission has the exclusive power to weigh the evidence and make such findings that, in the exercise of its sound discretion, the evidence appears to warrant. Nor do we assert that this Court can weigh the evidence. When, however, the findings are beyond the scope of such sound discretion as applied to the facts of record, when they are plainly arbitrary, or when they are necessarily based upon an assumed set of facts which are not supported by the evidence, a court of equity has the necessary jurisdiction and power to grant the relief sought.

As a matter of law it was necessary that the Commission be convinced by what it considered a fair preponderance of the evidence of the existence of every material fact and to find every fact necessary to sustain the order and the conclusions of fact upon which it is based. While such preponderance of the evidence need not appear to this Court, yet the Commission cannot justify the necessary implication that in its opinion such preponderance of evidence did exist in favor of its findings and order upon every material fact necessary to support them unless there was evidence, which, at the very least, was substantial, tending toward the establishment of every such material fact. When the very evidence upon which the Commission relied to support its conclusions plainly demonstrates the contrary, or when there is an absolute failure of evidence upon a single material fact necessary to its conclusions, this Court must hold that the order is void, since the error then becomes

one of law. *Interstate Commerce Commission* v. *L. & N. R. Co.*, 227 U. S. 88, 92. The respects in which the order fails because there is no substantial evidence is dealt with below.

(a) THERE IS NO EVIDENCE TO SUPPORT A FINDING THAT THE RATES APPROVED ON INTERSTATE SWITCHING TRAFFIC IN THE *FIRST REPORT* ARE JUST AND REASONABLE.

(1) THE COST STUDY DOES NOT PROVIDE SUCH EVIDENCE AND, STANDING ALONE, WAS IN FACT FOUND BY THE COMMISSION TO BE INSUFFICIENT. THAT FINDING OF INSUFFICIENCY WAS WELL JUSTIFIED BY DEMONSTRATED INFIRMITIES IN THE COST STUDY.

Under point IV-(a) and (d) above we deal with the question of whether the Commission made a finding as to the reasonableness of either the interstate or the intrastate rates within the district.

Even if, by a strained construction, the Court is able to find that the Commission did make findings proper in form as to the reasonableness of such rates, we shall now proceed to show that there is no evidence of record which could support such findings, and that, in the absence of such evidence, the order entered in connection with the *Second Report* is void and must be set aside.

The orders entered by the Commission in this proceeding have their foundation, if they have any foundation, in the cost study and nowhere else. This is true as to every subordinate finding which touches upon the matter of reasonableness of rates or upon the matter of relation of revenue under rates to the cost of transporting the traffic to which such rates apply. Confident of their inability so to do, we challenge the appellees to point to any evidence other than the cost study touching upon these matters.

In asserting that the cost study considered alone does not provide a proper index by which to measure the reasonableness of the rates or relation of rates under consideration,

we perhaps need not go farther than the definite and specific finding made by the Commission on page 705 of its *First Report* (R., 69) where it said:

> "We can not, however, accept the cost study as a definite yardstick by which alone to measure the reasonableness of the rates under consideration * * *."

The criticisms of the cost study which the Commission itself recites in its two reports and the deficiencies in the cost study which are pointed out in the opinion of the Illinois Commerce Commission (R., 255) and of the Public Service Commission of Indiana (R., 343) fully support this finding in the *First Report* of the Commission. We shall not undertake in this brief to analyze in detail these deficiencies in the cost study. It is, however, desirable to sketch broadly some of its outstanding defects.

First, it will be noted that although thirty-five carriers engage in switching traffic within the district, all of them being subject to the Commission's order, only fifteen of them participated in the cost study. Such a number might be sufficient if there were some evidence to support a finding that the conditions upon, and the traffic of, the fifteen cost study roads reflected the average for all the roads within the district. There is, however, no such evidence in the record. In fact, the evidence plainly indicates that the conditions on some of the excluded roads were so vastly different from those included within the study that the fifteen manifestly could not reflect an average for the whole thirty-seven. For example, it is shown by Exhibit 9 (R., 466) that the average haul for one-line traffic on the Chicago Junction Railroad in the district in September, 1926, was only 1.6 miles. This was based on an analysis of 1,764 cars which was the largest number of cars handled by any single carrier in switching service in the district during that month with the single exception of the Indiana Harbor Belt. A table contained on page 679 of the *First Report* (R., 43)

shows that for all cars included within the study, both state and interstate, the average distance of the one-line haul was 13.19 miles. On the face of it a study based on roads producing that average is wholly unrepresentative in so far as service on the Chicago Junction is concerned. It will be recalled that the Chicago Junction was not one of the study roads.

That these 15 carriers are not representative is shown by tables as to average hauls on pages 36 and 37 herein, separated as to study and non-study traffic.

As further indicating that the study roads could not possibly be representative, we point to the fact that the Elgin, Joliet & Eastern, which operates extensive mileage outside of the Chicago switching district, was one of the study roads. There were included in the study 7,093 cars handled in one-line service by the Elgin, Joliet & Eastern. Of these, however, 6,854 involved movements outside the district. These E. J. & E. cars moving *outside of the district* on which costs were computed for the purpose of establishing a basis of rates *within the district*, constituted *more than one-half* of the one-line cars of all the 15 carriers embraced in the whole study. (R., 1099; Tr., 2873-4.)

Extremes in particular items as between the roads represented in the cost study must indicate the likelihood of there being similar differences between the average of the fifteen study roads and the entire thirty-seven. The switching costs in the study were based on a computation of engine hour cost, and for the study roads themselves this cost is shown by Exhibit No. 2 as varying from $8.76 per engine hour for engines of the Chicago, Burlington & Quincy engaged in "other than general switching" to $33.33 per engine-hour for engines of the Indiana Harbor Belt engaged in operating the Gibson Hump.

The engine hour cost was reduced to a cost per individual car for a particular service by determining for particular

services the output per engine hour. Exhibit 4 shows that in classification service this output per engine hour ranged from 14.7 cars on the Elgin, Joliet & Eastern to 48.1 cars on the Chicago Short line. In interchange service the extremes were 8.7 cars per engine hour on the Chicago, West Pullman & Southern at West Pullman, to 70.2 cars per engine hour on the Chicago, Milwaukee & St. Paul in Chicago. The extremes in output of cars handled per engine hour at freight houses ranged from 3.7 cars on the Pennsylvania at Colehour to 36.9 cars on the Indiana Harbor Belt.

There is no assurance that the situation on the roads excluded from the cost study fall either within or without these extremes. There is certainly no assurance that the average for the excluded roads is the same as the average for the study roads. The lack of such assurance necessitates the conclusion that there is no evidence to support the implication in the Commission's report that the average costs developed by a study on fifteen roads is approximately the same as the average costs on all thirty-five roads.

In *Florida East Coast R. Co.* v. *United States*, 234 U. S. 167, this Court set aside an order of the Commission which, by its terms, applied to the Florida East Coast Railway among other lines, because the evidence supporting the order was based on transportation circumstances and conditions obtaining on the Atlantic Coast Line and the Seaboard Air Line.

The second important deficiency in the cost study is the limited time embraced therein, being but one week for each of the fifteen carriers in the year 1927. There is no substantial evidence in the record, nor was any attempt made to produce evidence that the conditions in the single week embraced within the study reflected average conditions for that year or for any other year. The Commission itself, in *Boston Wool Trade Assn.* v. *Director General*, 69 I. C. C.

282, at pages 298-9, in which case a similar study was made, extending however over a period eight times as long as in the Chicago case, expressed a similar criticism in the following language:

> "* * * it is obviously dangerous to predicate conclusions upon a short test period which may or may not reflect average conditions. Conditions in switching yards change continually and economy of operation necessitates increase or reduction of the switching force from time to time, with realignment of the work in each case."

A third important defect in the method of the cost study is in using engine hour costs as a base, such costs being computed by spheres or zones of service, and at the same time failing to follow an equal zoning in respect of general operating costs and the investment values which through the channel of engine hour costs were finally brought home to particular movements.

The Saur-Coverston formula has been presented to the Commission and considered by it in a number of cases, and was commented upon by it in various published reports, notably in *Switching at Little Rock*, 140 I. C. C. 583, where the formula was considered in its application for the determination of switching costs. In that case the carriers presented a cost study based, as in this case, upon engine-hour costs, clerical costs, car-maintenance costs, and an item for taxes, rentals and return on investment, omitting items for car rental and the service of classifying the cars incident to switching. There the rate proposed was $7 per car. The cost study showed $6.92 per car without the inclusion of car rental and the service of classifying cars incident to switching. The $6.92 included 88 cents for taxes, rentals and return on investment, making the actual costs $6.04. The Commission considered the method for segregating the operating expenses between the three main items,

switching, clerical and car-maintenance costs, and since the method followed in the *Little Rock Case* so closely approximates the method followed in the instant case, we quote at length from the Commission's decision therein (page 584):

> "In the matter of the assignment and apportionment of the expenses and investment to switching services, the methods used in the cost study were the same as those used in *Switching at Kansas City,* 96 I. C. C. 538. These provide for segregating the operating expenses between (1) switching costs, (2) clerical costs, and (3) car-maintenance costs.
>
> Under the method used for approximating the switching costs, all classes of expenses assigned and apportioned to switching service in the terminal during the test period were aggregated and divided by the total switch-engine hours during that period in all services, including freight service, passenger service, and non-revenue or company switching service. The average switch-engine hour cost thus obtained was assumed to be representative for all classes of switching service. It was then applied to the average time consumed in switching a car in each of the switching zones into which the terminal was divided, and the result was assumed to represent the average cost of switching a car in each of such zones. In approximating the cost of performing a particular switching service, the cars involved were traced through each of the zones through which they passed in both loaded and empty movements, and the average costs of both movements in such zones were then applied and the resulting amounts aggregated and divided by the number of loaded cars to determine the average per car.
>
> This method of approximating switching costs, which is based on the assumption that the cost is directly proportional to the amount of engine time consumed, is subject to the criticism that, inasmuch as many classes of expenses do not vary directly with the amount of engine time consumed in switching, it serves to bring about an inequitable apportionment of such expenses between different services, and results in overcharges to some and undercharges to others. Using for illustration the expenses for maintenance of way and struc-

tures, which are included in the engine-hour cost, if the actual maintenance cost of two groups of tracks is exactly the same, and it requires 10 minutes to switch 10 cars on the first group of tracks, and 30 minutes to switch 10 cars on the second group of tracks due to less favorable track layout or other causes, under this method the average amount of track maintenance per car handled on the second group of tracks would be three times as great as that on the first group, although obviously it should be no greater.

The inclusion of the engine-hour cost of all classes of expenses, other than those involved in car-maintenance costs and clerical costs, has the effect of spreading them over all zones and the cars and switching services using such zones, regardless of the fact that in some instances some of these expenses may not be actually involved at all.

The record in this case, as in other switching studies, shows that a very large proportion of the time consumed in switching between industries and connections is spent in switching at the industry. The record does not show whether the tracks of the industries in Little Rock and North Little Rock are maintained by the industry or by the carrier, but if the industry maintains them, as is generally the case, the obvious effect of including maintenance of way and structures in the engine-hour cost and applying that cost to the large amount of time spent in switching at the industry is to charge the switching in the industry zone with a large expense for track maintenance that is not actually incurred. Inasmuch as the maintenance of way and structures included in the engine-hour cost is based on the total of these expenses actually incurred in the terminal divided by the total engine hours therein, including the time spent in switching on industry tracks, the effect of applying this engine-hour cost to time consumed in switching is to overcharge the switching service in zones where the carrier does not maintain the tracks and to undercharge the switching service in zones where it does maintain the tracks.

The apportionment of the expenses of maintenance of way and structures between switching zones in the terminal on the basis of the amount of engine time

spent therein, instead of actually allocating these expenses to the respective zones according to the location of structures and equated mileage of tracks maintained therein, as might readily have been done, is unsound in principle and inequitable in effect. The tendency of this method is to apportion to some zones, and thereby to the cars and services using such zones, an excessive proportion of the terminal maintenance cost where the amount of engine time in the zone is large by reason of unfavorable track layouts, railroad and street crossings at grade, delays occasioned by waiting for road trains, and other causes which serve to slow down switching operations, and to apportion to other zones, cars, and services, an insufficient share of the terminal maintenance where the amount of engine time is relatively small by reason of conditions favorable to the expeditious performance of switching operations. If all classes of switching service used all zones in the terminal, while this method of dividing the maintenance expenses would still be unsound, they would at least receive equal treatment in the apportionment of these expenses. Inasmuch as the different switching services do not all use the same switching zones, this method results in apportioning too large a share of the maintenance cost to some and too small a share to others."

Another defect in the cost study of some importance is the operating ratio which the carriers applied to the aggregate clerical, car detention and switching costs in order to obtain total costs, including an amount sufficient for taxes, return on investment, etc. The carriers claim, without the use of any operating ratio, a cost for one-line hauls of 1.93 cents, for two-line hauls of 2.38 cents, and for three-line hauls of 2.87 cents, these being claimed as the average for state and interstate traffic. (Exhibits 97 and 83; R., 279.) The carriers use an operating ratio of 66.67 per cent which, when applied, produces total costs or rates for one, two and three-line hauls of 2.9 cents, 3.56 cents and 4.3 cents, respectively. (R., 46.)

The only basis for the use of an operating ratio of 66.67 per cent is the general contention that in the period of the study that ratio was necessary for the country as a whole if all carriers in the United States were to secure enough over and above operating costs to pay taxes and make a proper return on investment. There is, however, no evidence in this record to bring that operating ratio home to the Chicago switching district, and its use is unjustified. However, except by the use of this operating ratio, the carriers, even on the basis of their own figures, are unable to obtain rates which even approach the rates prescribed.

The vice of the Commission's showing on page 54, from which it deduces an operating ratio of 93.14 for 1-line traffic, and as indicating that present rates are "too low", as to which the facts are stated on page 26 of the Statement, lies in the fact that it eliminates certain revenues shown in the study without eliminating or changing the operating expense, and also in the fact that the revenues used in the comparison did not accrue on the *same cars* or traffic for which cost is shown. The carriers' and shippers' showings, set forth on page 682 of the decision (R., 46) as to operating expenses, when compared *with revenues on the same cars,* result in operating ratios as appears in the report of the Illinois Commission (R., 280) for 1-line hauls of 74.52 per cent when based on the carriers' claims and of 59.46 per cent when based on shippers' claims. (R., 281.)

If the Commission had based its computation on the study cars and the average adjustment which gave full effect to the contentions of both the carriers and the shippers (R., 51), it would have arrived at an operating ratio for 1-line hauls of 62.93. (R., 1107-8; Tr., 2895.)

(2) THE COMPARISONS WITH LINE-HAUL RATES IN WIDELY REMOVED TERRITORIES WHICH THE COMMISSION USED AS AN ADDITIONAL TEST OF THE REASONABLENESS OF RATES WERE NOT IN EVIDENCE, NOR WERE THEY SUPPORTED BY EVIDENCE AS TO COMPARABILITY OF CONDITIONS.

We have already disposed of the cost study as constituting evidence that the increased interstate switching rates are just and reasonable, pointing out that the Commission itself found that the cost study, standing alone, would *not* support the finding made as to the reasonableness of the rates considered in the *First Report*. (R., 69.)

The only other matters even touched upon by evidence or in the reports which tend to support a finding of reasonableness are (a) comparisons with switching rates in other switching districts, and (b) comparisons with line-haul rates, the differences, if any, in transportation circumstances and conditions to be considered in both cases.

Dealing first with comparisons with switching rates in other districts as offered in justification of the proposed all-commodity interstate rates, there is not even a mention of any such comparison in the *First Report*. In the *Second Report* two paragraphs on page 101 (R., 149) are devoted to a consideration of switching rates in other districts all of which are stated to be substantially lower than the Chicago district rates. This evidence did not come from the carriers but came from shippers in an endeavor to prove that the increased interstate Chicago rates were excessive. The Commission refused to accord this proof any weight, stating that no cost figures were submitted for the compared districts nor was there any proof as to similarity of average hauls. It consequently is a true statement that the record contains not one syllable of evidence which even slants at supporting the reasonableness of the Chicago district rates by comparisons with switching rates in other districts.

In so far as the comparisons of switching rates with line-haul rates are concerned, differences in circumstances and conditions considered, Appendix B to the *First Report* (R., 77) contains a request by the Commission addressed to the carriers to furnish the following information:

> "(h) What factors make the cost of a switching haul in the Chicago district greater or less than an average road haul of the same length in Illinois or Indiana in the vicinity of Chicago? (Cover only complete local movements and do not include movements in connection with road hauls from or to points without the district.)
>
> (i) Is a local switching haul, as described in the preceding paragraph, of a given length, more or less expensive in the aggregate than a road haul of the same length? Give full data supporting answer."

The carriers introduced no evidence responsive to the Commission's request. The Commission, however, undertook to deal with the subject in four paragraphs on pages 705 and 706 of its *First Report* heretofore quoted on pages 28-9 of this brief. It cannot be successfully contended that these comparisons with line-haul rates constituted a part of the evidence which supported the finding that the approved rates were reasonable.

Comparisons relied upon are with three different *distance scales* of rates, one applying on brick in the southwest, a second applying on sand, gravel, etc., in Arkansas, Louisiana and Texas, and the other applying on iron and steel throughout the length and breadth of official classification territory. All three are line-haul scales and *do not apply on any switching movement*. The record contains no evidence of any sort comparing the costs of or the conditions surrounding the line-haul traffic with the costs of or the conditions surrounding switching traffic except that set forth herein at pages 29-32. The Commission, at page 706 of its *First Report* (R., 70), phrases it thus:

> " * * * the record contains no evidence to indicate that it costs less to handle traffic by switch engine than by road engine for road hauls of similar distances * * *."

At pages 29 to 32 herein we show the evidence negativing the above quotation.

To digress for a moment for the purpose of showing the mischief resulting from the Commission's treatment of these line-haul rate comparisons, let us assume that the case involved rates on sand and gravel, a very low rated commodity, from Chicago to Springfield, and that the entire evidence in the case related to that particular movement. Further let us assume that in some prior decision the Commission had prescribed in the states of Arkansas and Louisiana a distance scale of rates on butter and eggs, much higher rated commodities. In deciding the *Sand and Gravel case* the Commission states that the evidence relating directly to the transportation of sand and gravel is not sufficient on which to predicate a finding and then goes on to say that in the states of Arkansas and Louisiana it had prescribed a distance scale of rates on butter and eggs and that in the record before it there was no evidence to show that it costs less to transport sand and gravel than it costs to transport butter and eggs for a similar distance. Further let us assume that, predicated on the *lack of such evidence* it entered a finding prescribing a minimum rate on sand and gravel and sought to support that finding by comparison with the Southwestern scale on butter and eggs. Manifestly such a finding, as a matter of law, would be set aside by a court of competent jurisdiction. The instant case is on all fours with the case just considered.

We also have another point of law which requires that

this Court reject the comparisons with line-haul rates upon which defendants rely.

The bare comparisons with the line-haul scales which the Commission itself recites are a necessary predicate for its finding, unaccompanied as they were by any comparison of transportation circumstances and conditions, can not, as a matter of law, serve as the base for *any* finding because they were not introduced *in evidence* at the hearings. What the Commission did was to take certain facts from three prior reports and bring such facts forward in its report in this case in support of its order. In *United States* v. *Abilene & S. R. Co.*, 265 U. S. 274, an order of the Commission was enjoined because it was in part based upon data not introduced in evidence at the hearings, this Court saying, at page 288:

> "Nothing can be treated as evidence which is not introduced as such."

This Court pointed out that the objection to basing a finding on data which was not introduced as evidence is not that it is not authentic nor trustworthy, but

> "It is that the carriers were left without notice of the evidence with which they were, in fact, confronted, as later disclosed by the finding made."

If the shippers had had notice of the intention on the part of the Interstate Commerce Commission to rely on comparisons with the three mileage scales mentioned as supporting the finding made, they would have availed themselves of the opportunity of attempting to prove that the conditions and circumstances under which such scales apply are wholly dissimilar from those which obtain in the Chicago switching district. Such proof if offered would have rendered the comparisons valueless. Being deprived of that opportunity by the arbitrary act of the Commission of predicating a finding on data which was not introduced

in evidence takes away from such data any value which it might otherwise have had. This, in itself, renders void an order which is predicated on a finding of reasonableness which in turn needs such data for its support.

In the light of what has just been said it can not be denied that the *only* evidence upon which the Commission could possibly base its finding of reasonableness of rates is the cost study.

Since the Commission rejects the cost study standing alone, and since the additional evidence on which the Commission relies is *not evidence,* it must be concluded that the finding of reasonableness as to the rates involved is unsupported and that the order assailed, which requires support in the evidence, is void.

(b) THERE IS NO EVIDENCE TO SUPPORT A FINDING THAT THE INTRASTATE RATES SUBJECT TO THE ORDER UNJUSTLY DISCRIMINATED AGAINST INTERSTATE COMMERCE.

If unjust discrimination exists, it exists as a fact and is susceptible of proof. Under Point IV (e) above, we have pointed out that there is no finding in the *Second Report* which defines the manner in which the alleged unjust discrimination occurs in fact. It was impossible for the Commission to make such a finding because there is no evidence of record which shows that unjust discrimination in fact exists.

Exhibit 105-A from which is taken the table on page 114 of the *Second Report* (R., 162) was presumably presented for the purpose of showing that the increase in the interstate rates, without a corresponding increase in the intrastate rates, has *per se* occasioned a reduction in the relative volume of interstate commerce. The carriers were presumably of the opinion that the exhibits justified the

conclusion just stated and that such a conclusion constituted proof of unjust discrimination in fact.

No such conclusion nor any other conclusion as to unjust discrimination can be drawn from the exhibit mentioned, because the witness who introduced it offered nothing but the bare figures and did not attempt to show as a fact that the proportionate decrease in the interstate traffic was in anywise due to the lower intrastate rates. (R., 948; Tr., 2171-2.) In connection with this matter it may be noted that on page 679 of the *First Report* (R., 43), it appears that at the time of the September, 1926, traffic study, only 40.29 per cent of the Chicago switching district traffic moved in interstate commerce. If a reduction of 4 per cent as between November and a succeeding January is to be attributable to difference in rates, what can explain the proportionate percentage increase in the interstate traffic as between 1926 and 1931 from 40.29 per cent of the whole to 57.53 per cent of the whole. The answer probably is that the composition of traffic as between state and interstate changes from day to day due to a variety of commercial and competitive conditions, and no one can state, speaking for the district as a whole, what is the precise reason for even a large swing in the relative percentages.

It may be, of course, that in that period from 1926 to 1931 the interstate traffic reflected such a proportionately great increase in percentage of the whole with a corresponding decrease for intrastate traffic, due to the fact that more and more of the intrastate traffic was diverted from the rails to other means of transportation as time went on.

Reverting to the reduction in the proportion of interstate traffic to the whole from 57.53 to 53.25 per cent, as shown in analysis of one week immediately prior to the increase in the interstate rates and one week immediately subsequent to that increase, it is fair to assume that the cause was the

diversion of a larger share of interstate than of intrastate commerce *to competing forms of transportation.* This bears out the prediction made by shippers at the hearings prior to the *First Report* as to the diversion of traffic which would result from an increase in rates. (R. 547, Tr. 340; R. 549, Tr. 348; R. 550, Tr. 349; R. 551, Tr. 356-7; R. 555, Tr. 371; R. 556; Tr. 373-4; R. 563, Tr. 397; R. 601, Tr. 590; R. 617, Tr. 653; R. 631, Tr. 709; R. 635-6, Tr. 726-9; R. 658, Tr. 826; R. 707-8, Tr. 998-1000; R. 711, Tr. 1011-3; R. 713, Tr. 1017; R. 864, Tr. 1593; R. 867, Tr. 1606.)

Between the week of November 9 to 15, 1931, and the week of January 11 to 17, 1932, interstate rates were increased 20 per cent for 1-line hauls, 40 per cent for 2-line hauls and 33⅓ per cent for 3-or-more-line hauls. It is perfectly reasonable to assume that such enormous increases in interstate charges via rail would have the effect of reducing the volume of interstate traffic. The change in percentage of total can in no wise be charged to the substitution of intrastate traffic for interstate rail traffic, but is entirely explained by the diversion of interstate rail traffic to trucks and rail hauls.

It also follows that, it having been shown that subsequent to the increase in interstate rates the volume of interstate declined from 57.53 per cent to 53.25 per cent of the total cars, it cannot be determined what the revenue to the carriers would have been on interstate traffic if the interstate rates had not been increased. It therefore reasonably appears that the computed loss of revenue or discrimination against interstate commerce is fatally defective because of the false assumptions (1) that the volume of interstate traffic was not decreased by the increase in rate, (2) that the intrastate traffic was increased by diversion from interstate to intrastate routes and (3) that increasing the intrastate rate to the interstate level would not cause a

diversion of traffic to trucks, barges, pipe lines or other forms of conveyance.

It may be argued that unjust discrimination in fact against a particular interstate commerce is shown by Exhibit 110, embracing an analysis of some 856 cars, upon which the Commission comments at page 113 of its *Second Report*. (R., 161.) That exhibit purports to show that from and to certain selected points traffic which prior to the interstate advance moved via interstate routes, even though from and to points within the same state, was rerouted so as to move wholly within a single state after the interstate rates were advanced. Practically the whole of this exhibit involves a situation which obtains solely on the Pennsylvania Railroad, and on no other railroad in the district (R., 974; Tr., 2282-3), and results from the fact that its main classification yard for serving industries located in the southern portion of the district on the Illinois side, known as Colehour, is just across the line in the State of Indiana. An inspection of the Official Map of the switching district shows Colehour in Illinois and the record fails to show that in the hearings in the first case the movements between points in Illinois through the Colehour yard were regarded as anything other than intrastate Illinois. That one railroad, according to the evidence, formerly followed the practice of taking a shipment from the Illinois point into this Indiana yard for classification incident to a subsequent movement to an Illinois destination. (R., 974--5; Tr., 2284-5.) The witness who offered this analysis admitted on cross-examination that he had no knowledge of whether this situation, which is peculiar to but one carrier out of the 35 involved in this case, obtained on other roads in the district. (R., 1026; Tr., 2506.) The same witness admitted on cross-examination that he was unable to tell whether the complete movement between Illinois points via intrastate routes,

which the witness termed "unnatural," was more expensive or more costly to the carriers than the complete movement via the interstate route which required a classification service in the State of Indiana. (R., 1025.)

Manifestly, since the entire case of the carriers is predicated on cost, there being no other evidence to sustain the finding as to the level of the rates, a comparison of traffic via interstate routes with traffic via intrastate routes which is not accompanied by a finding as to *relative costs*, constitutes no proof whatsoever of unjust discrimination in fact.

Unjust discrimination in fact might be proven if the intrastate rates made subject to the order provided a lesser margin of profit to the carriers than the interstate rates approved in the *First Report*. Such proof, however, is lacking, and the reason why the carriers were unable to offer it is explained by the fact that the cost study made no separation between intrastate and interstate commerce in respect of the property utilized and the costs incurred.

(c) THERE IS NO EVIDENCE WHICH SEPARATES THE INTRASTATE AND INTERSTATE PROPERTY, REVENUES AND EXPENSES OF THE CARRIERS SO AS TO MAKE IT POSSIBLE TO COMPARE REVENUE WITH COSTS FOR INTRASTATE SWITCHING TRAFFIC CONSIDERED SEPARATELY FROM INTERSTATE SWITCHING TRAFFIC.

Since the order of the Commission is founded on what may be termed a revenue-discrimination basis, it must be supported by evidence which shows that the relation of revenue to costs for intrastate traffic separately considered is different from the relation of revenue to costs on interstate traffic separately considered. And the difference must be in the direction of the intrastate traffic providing a lesser margin of profit than the interstate traffic. It is obvious from the character of the case that unless such evidence were of record before the Commission, there can

be no proper basis for finding that the intrastate rates in effect at the time of the Commission's consideration occasioned unjust discrimination against interstate commerce.

We have heretofore touched upon the absence of any definite finding in the *Second Report* upon this point. The reason why such a definite finding could not be made is that there is no evidence of record which develops separately for intrastate and for interstate traffic the costs attaching directly thereto. The cost study throughout the entire application of the formula treated only with an average of state and interstate traffic. No effort was made to segregate direct costs, indirect costs, or investment values as between state and interstate traffic.

The absence of evidence making such a segregation invalidates the order complained of: *Smith* v. *Illinois Bell Telephone Co., supra,* in which this Court held that such an allocation was a necessary prerequisite.

In this case there is not only a lack of a finding making such an allocation, but there is also a complete lack of evidence to support such a finding if it had been made.

The lack of such evidence leaves us without a yardstick based on costs by which to determine whether the former rates on intrastate traffic did in fact unjustly discriminate against interstate commerce. There is, however, no yardstick, other than costs, even remotely available, since the only test of discrimination which is offered in the reports of the Commission is on a comparison of rates with costs.

The absence of evidence making the segregation, rendered it impossible for the Commission, even if it desired to do so, to make a separation and allocation of costs and of use of property which, according to the decision of this Court in the *Smith Case, supra,* is necessary whenever both state and interstate traffic are involved.

(d) THERE IS NO EVIDENCE TO SUPPORT A FINDING THAT THE INTRASTATE TRAFFIC SUBJECT TO THE ORDER IS SIMILAR TO THE INTERSTATE TRAFFIC IN THE DISTRICT IN RESPECT TO (1) COST OF SERVICE, (2) KIND OF TRAFFIC, (3) THE CARRIERS PERFORMING THE SERVICE, AND (4) THE CONDITIONS AND CIRCUMSTANCES SURROUNDING THE SERVICE.

In the course of our argument under Point IV(b) above, we developed the reasons why a valid order may not be entered under Section 13-(4) of the Act in the absence of a finding that the intrastate service for which the minimum rate is prescribed is a like and contemporaneous service rendered under substantially similar circumstances and conditions as the interstate service rendered in the interstate commerce found to be unjustly discriminated against.

Under that same point we discuss the findings which the Commission did make in its *First* and *Second Reports* to show that none of them is the equivalent of a definite and affirmative finding of the character just mentioned. The Commission was unable to make a plain, definite and unambiguous finding in respect to this matter since the evidence plainly shows that the intrastate traffic is not like the interstate traffic and that the intrastate service was rendered under dissimilar circumstances and conditions in various particulars: First, there are substantial differences between the state and interstate traffic in respect to the kind and composition of the traffic. Exhibit 7-(a), commented upon at page 38 above, shows that there are numerous commodities handled in one-line service in intrastate commerce which are not handled in one-line service in interstate commerce. Consequently, the traffic is not like traffic.

There are also important and controlling differences as between the carriers who perform intrastate service and those who perform interstate service. This has been com-

mented upon extensively elsewhere herein, and results from the fact that twenty of the carriers operating within the district have no lines therein which cross the state line. Consequently, in so far as service on their individual lines is concerned, as well as in so far as service jointly of any two or more of them is concerned, no traffic can be handled in the district in interstate commerce.

This Court held in *Florida East Coast R. Co.* v. *United States*, 234 U. S. 167, that evidence bearing upon the service and rates on one line in a general area will not serve to support a mandatory order directed to rates on another line in the same area in the absence of evidence relating to the service on the second line. In that case an order of the Commission prescribing certain gathering rates in Florida on citrus fruits and vegetables was predicated upon evidence as to conditions on the lines of the Atlantic Coast Line and the Seaboard Air Line. No evidence was presented as to conditions on the line of the Florida East Coast Railway and the operation of the order upon the rates of the latter carrier was enjoined, on the ground that as to the service and rates of the Florida East Coast there was no evidence whatsoever to support the order.

In so far as the finding in this case as to similarity of conditions is concerned, there is a like absence of evidence, and the section 13 order to which that finding is a necessary prerequisite is consequently invalid.

Even more important, however, as a distinguishing circumstance between the state and the interstate service is the fact that the average lengths of haul and other circumstances of transportation which bear directly upon costs are not the same for the commerce which is handled intrastate within the district as for the commerce which is handled interstate within the district. Taking the intrastate commerce in Illinois, for example, we have shown elsewhere

herein that the average haul on one-line shipments is but 48 per cent of the average haul on interstate shipments. For two-line shipments the average haul is 55 per cent and for three-line hauls 68 per cent.

These differences in average hauls are of great significance and their significance is not impaired by any finding made by the Commission. It is true that on page 118 of the *Second Report* (R., 166) the Commission stated:

> "We further find that the transportation conditions throughout the Chicago switching district are substantially similar."

Obviously, in so far as average lengths of haul are concerned, that finding is not supported by, but is directly contrary to, the evidence.

A statement that the length of haul in switching service is of little importance and is not controlling means nothing because there is no evidence of record to show that the cost of switching service is the same for a haul of 15 miles as it is for a haul of 7 miles.

The whole basis for the cost study made by the carriers rests on the time required to perform a given service, and as stated, that time was computed for the average of state and interstate traffic without segregation between them. Since time is the foundation for the computed and claimed cost, there must obviously be a greater cost on two-line hauls in handling an interstate car an average distance of 28.7 miles than the handling of an Illinois intrastate car an average of 15.8 miles and an Indiana intrastate car an average of 7.2 miles, unless the miracle happens of a train starting from point A and arriving at one and the same time at point B, 7.2 miles distant, at point C, 15.8 miles distant, and at point D, 28.7 miles distant.

While the Commission ignores distance in arriving at a

lawful relation of rates, yet the very two reports under consideration indicate that it still holds to the belief, which is a proper one, that a difference in distance results in a difference in costs and justifies a difference in rates even in switching service. For example, at page 697 of the *First Report* (R., 61), the Commission approves the exclusion of the Chicago Junction from the cost study on the ground that the average length of haul on that carrier was not comparable with the average length of haul on other lines within the district.

At page 113 of the *Second Report* (R., 161), in discussing a carrier exhibit analyzing the routes traveled by some 856 cars, the Commission said (italics ours):

> "On cross-examination it developed that a considerable haul, in several instances amounting to approximately 20 miles, in connection with the so-called natural or interstate routes, could be saved by the use of more advantageously located interchange connections. A number of such movements were pointed out, and in those cases what was the natural haul over an interstate route would become the shorter haul via an intrastate route, and would involve *the most economical movement.*"

In that portion of the *Second Report* which dealt with the formal complaint, the Commission rejected comparisons by shippers with substantially lower switching rates in other districts (R., 149), on the ground that no attempt was "made to compare the average hauls in those districts with the average hauls within the Chicago district," and it was implied that lower switching rates approved in Detroit in *Increased Switching Charges at Detroit*, 91 I. C. C. 82, were justified by the fact that the average haul in the Detroit district was shown to be about eight miles. That average haul is longer than the one-line average haul intrastate in either Illinois or Indiana in the Chicago district. (See p. 37 above.)

In its *First Report* the Commission, as is elsewhere noted herein, sought to support its finding as to the reasonableness of the interstate rates approved, by comparisons with certain line-haul rates and at page 706 (R., 70) the Commission relied on the fact that the rates with which comparisons were made applied for "similar distances."

It is unfortunate that the carriers did not segregate intrastate from interstate traffic in their development of the switching costs claimed. If they had done so it is certain that the state traffic, moving as it does for average hauls substantially shorter than the interstate traffic, would exhibit a correspondingly lower cost. As to some items of cost the statement just made can be easily demonstrated.

In so far as direct costs such as labor and the expense of operating an engine is concerned, a contention that the cost of a 28-mile operation is no greater than the cost of a 15-mile operation runs counter to common experience. Under some peculiar circumstances it might be possible, but there is no evidence which translates the possibility into a proven fact.

The following table, taken from page 22 of Exhibit 120, will give the Court an idea as to the amount of investment in land and tracks *per mile* for carriers within the district:

INVESTMENT PER MILE.

Carrier	Land	Tracks	All road, except land	All road, including land
B. & O. C. T.	$56,300	$28,900	$44,700	$101,000
Belt Ry.	12,900	25,400	32,400	45,300
I. H. B. R. R. Co.	5,200	14,300	20,200	25,400
C. R. & I. and C. J.	116,000	24,700	33,200	149,200
C. & I. W. R. R. Co.	16,700	22,400	23,000	39,700
C. S. L. Ry. Co.	20,100	14,700	29,900	50,000
C. W. P. & S. R. R. Co.	14,100	13,500	23,700	37,800
I. N. Ry. Co.	42,300	40,200	49,100	91,400
Pullman R. R.	13,500	9,900	14,200	27,700
C. & W. I. R. R. Co.	62,300	46,900	68,200	130,500

A consideration of the foregoing data clearly indicates the extent to which additional hauls for interstate traffic over the hauls in intrastate traffic require the use of large investments in land and tracks for each mile in the excess portion of the haul.

That the cost of the 28-mile operation in fact exceeds the cost of the 15-mile operation is even more evident when we consider those items of expense which are incurred by reason of roadway maintenance. The method used by the carriers for computing costs, brought into their engine-hour costs the expense of maintaining track and roadway over which such engines operated. The application of the operating ratio brought into the total costs the element of return on investment and taxes on such track and roadway which is 33 per cent of the total costs. (R., 50.) Both of these elements of cost must necessarily in so far as any particular movement or the average of a group of movements is concerned, be directly related to the distance over which a particular shipment might move. Consequently, these items of cost on a shipment handled for 28 miles would necessarily be almost twice as great as similar items of cost attaching to a shipment moving only 15 miles. The effect of the Commission's decision, however, is to ignore *in toto* such differences in cost.

However, a relation of rates is not and can not become unlawful unless the relation of rates is improperly proportioned to the relation of the services rendered. This is true whether we are dealing with unjust discrimination under Section 13, unjust discrimination under Section 2, or undue preference and prejudice under Section 3. While the precise subject matter may be different in cases arising under these three sections, they all involve the relation of rates to service and under all three of these sections the relation of rates must be tested by the transportation standard and the transportation standard alone.

In *United States* v. *Illinois Central R. R. Co.*, 263 U. S. 515, at page 524, this Court said:

> "To bring a difference in rates within the prohibition of Section 3, it must be shown that the discrimination practiced is unjust when measured by the transportation standard. In other words, the difference in rates cannot be held illegal unless it is shown that it is not justified by the cost of the respective services, by their values, or by other transportation conditions."

In *Interstate Commerce Commission* v. *B. & O. R. R. Co.*, 145 U. S. 263, this Court after citing numerous decisions, said (page 284):

> "In short, the substance of all these decisions is that railway companies are only bound to give the same terms to all persons alike under the same conditions and circumstances, and that any fact which produces an inequality of condition and a change of circumstances justifies an inequality of charge."

If the transportation standard is the only proper standard for measuring an alleged discrimination under Section 3, and that means that a difference in rates is excused by a difference in the circumstances and conditions surrounding the services for which such rates apply, then the transportation standard is the only proper standard for measuring discrimination under Section 13. To hold otherwise would leave us without any test or yardstick at all by which to determine the cases in which it is lawful and right to require the maintenance of the same rates on intrastate commerce as may be contemporaneously maintained on interstate commerce.

If it were not for the fact that the interstate rates constitute the only standard which the Commission has erected in this case for determining what should be minimum intrastate rates, the matter of similarity or dissimilarity of transportation conditions would not be of such great importance. That is, if the order in this case were predicated

on a finding that the state rates considered of and by themselves were so low as to be less than compensatory, and if in such a case another finding were made that an increase in such rates to a specified compensatory basis might reasonably be expected to yield the carriers greater net revenues to the point where the state traffic would be paying its proportionate, fair share of transportation costs, we would have an entirely different situation. This, however, is not that kind of a case. The Commission made no finding as to the relationship between revenue and cost in respect to the intrastate traffic considered by itself and on its own merits. Such a finding was impossible on this record, because the cost study did not state separately the unit costs on state and interstate traffic.

The Commission, in its *First Report* in this proceeding, approved what purported to be reasonable rates on interstate traffic and necessarily confined itself to those facts which related to interstate traffic. In its *Second Report* it has found that minimum rates on state traffic should be at the level approved as maximum on interstate traffic. **Stated differently, it has used maximum interstate rates as its yardstick for minimum intrastate rates.** Under such circumstances its action is arbitrary and without foundation in the evidence unless it appears that the service rendered on the intrastate traffic is substantially similar to the service rendered on interstate traffic.

If it could be contended that the maximum interstate rates, as fixed by the *First Report*, were based solely on interstate costs, conditions and revenues, then it follows without argument that such interstate costs, conditions and revenues formed the sole basis of the *Second Report* fixing minimum intrastate rates and that the very elements which affect intrastate traffic, viz., intrastate costs, conditions and revenues, were not even considered, and as a result we

would have the *maximum* rates for the admittedly greater and, therefore, more expensive interstate service becoming the *minimum* rates for the less costly intrastate service.

(e) THERE IS NO SUBSTANTIAL EVIDENCE TO SUPPORT A FINDING THAT THE INCREASE IN THE INTRASTATE RATES TO THE INTERSTATE BASIS WOULD IMPROVE THE POSITION OF THE APPELLEE CARRIERS IN SO FAR AS ADDITIONAL INCOME IS CONCERNED.

At pages 46-57 of our Statement we summarize the evidence which shows that the effect of increasing the intrastate rates would be to deprive the carriers of traffic providing substantial revenues, so that in the end the rate increase would result in smaller rather than greater revenues from such business. In respect of this evidence, the Commission at page 118 of its *Second Report* (R., 166) said:

> "While the evidence shows that the existing competition by motor truck is material, and indicates that this means of transportation will be utilized to a greater extent if the intrastate rates are increased, and that therefore, some additional tonnage in all probability will be lost to trucks, or diverted to barge and pipe-line movement, the record nevertheless is convincing that the carriers will derive a substantial increase in revenue if the intrastate rates are increased to the interstate basis, and we so find."

We respectfully submit that there is no evidence upon which the Commission could predicate the statement with which it concludes the above finding. There was not a single carrier witness who undertook to show what the effect would be on carriers' revenues of the diversion of traffic as to which the shippers testified. In the absence of such evidence the finding of the Commission above quoted is based on pure assumption and can not serve to support the order.

Elsewhere we have shown the testimony of the shippers

all of which was to the effect that increasing the intrastate rates would result in a decrease in revenue. Moreover, the two skilled and able Examiners who heard the testimony in the case found, as shown in their proposed report (R., 134), as follows:

> "The record does not indicate that an increase in the intrastate rates to the level of the interstate rates would result in increased revenues to the carriers. The testimony shows that the existing competition by motor truck is material, and indicates that this means of transportation will be utilized to a greater extent if the intrastate rates are increased, and also that some tonnage would be diverted to barges and pipe lines. Furthermore, the preponderance of the intra-district movements is intrastate, and there is but a slight margin between the existing intrastate and interstate rates. Certain of the intrastate rates, due to exceptions to the Lowrey basis, are on a higher level than the present interstate rates. The carriers show the difference between the total revenues which would be derived if the existing intrastate rates and the interstate rates were applied to the same volume of traffic. They rested their case primarily upon this showing to prove a violation of Section 13. But this is neither convincing nor adequate proof that an increase in the intrastate rates to the interstate basis would result in an increase in total revenue as there are present the other factors mentioned above which would tend to decrease the volume of traffic sufficiently at least to offset any additional revenue which otherwise might be gained by an increase in the rates."

After pointing out as above that the record did not even indicate that an increase in the intrastate rates to the level of the interstate rates would result in increased revenues to the carriers, the Examiners made the following recommendation (R., 134-5):

> "The commission should find that the maintenance of intrastate rates and carload minimum weights on a lower basis than the corresponding rates and minimum weights, found not unreasonable and approved for in-

> terstate transportation in switching service, has not been shown to result in unjust discrimination against interstate commerce or in undue preference and advantage of persons and localities in intrastate commerce nor in undue prejudice and disadvantage to persons and localities in interstate commerce."

Where is the evidence which "convinced" the Commission to take a contrary view of what the Examiners found? Let opposing counsel point to the page on which it can be found!

As noted in the statement (pages 39-42 above), the record purports to contain two analyses which relate to the revenue which would accrue under increased intrastate rates. These analyses are summarized at page 116 of the *Second Report*. (R., 164.)

The first of these is the constructive application of the increased interstate rates to the intrastate traffic handled at the time of the September, 1926, traffic count. That analysis adds nothing to the record because it is nothing more than a statement of the *gross* revenues which would have accrued *if* traffic moving more than 7 years ago were now moving and *if* certain rates were applied thereto. Obviously the analysis does not touch upon prospective revenues in 1932, or 1933.

The carriers also took the traffic in one week of November, 1931, and one week of January, 1932, for the purpose of making a similar constructive application of interstate rates to intrastate shipments. These computations are in the same category as those just discussed except for the difference as to the period. They afford no information as to prospective income.

We already know that the difference between the 1-line intrastate rate of 2.5 cents and the 1-line interstate rate of 3 cents is one-half cent and that on a 60,000 pound minimum car that difference will amount to $3. If it be assumed

that during a given year 500,000 cars will move in 1-line hauls in interstate commerce that difference, as applied thereto, would result in a difference in gross revenue of $1,500,000. When all is said and done, however, the only concrete fact which this demonstrates is that the difference between the intrastate rates and interstate rates on 1-line hauls amounts to one-half cent per 100 pounds. The arithmetical computations upon which the Commission comments add nothing to the fact just stated.

In the report of the Commission on which was based the order set aside in *Florida* v. *United States*, 282 U. S. 194 (*Georgia Public Service Commission* v. *A. C. L. R. Co.*, 146 I. C. C. 717), a statistical table was inserted to show, dependent upon the length of the haul, the differences between the state rates found to be unjustly discriminatory and the interstate rates fixed as a minimum based on state traffic for the future. This Court held that the table mentioned did not constitute a sufficient finding in respect to the earning which the carriers might be expected to derive in the event the state rates were increased to the interstate level. However, in the *Second Report* in this case, the Commission in substance did no more than it did in the *Georgia Public Service Commission case*, *supra*, and its inability to make a more specific or definite finding was due to the failure of the carriers' proof.

(f) THERE IS NO EVIDENCE TO SUPPORT THE FINDING THAT THE UNJUST DISCRIMINATION AGAINST INTERSTATE COMMERCE FOUND TO EXIST WAS OCCASIONED BY THE SAME CARRIERS WHO MAINTAINED THE INTRASTATE RATES WHICH UNJUSTLY DISCRIMINATED IN FAVOR OF INTRASTATE TRAFFIC.

The point to which we now address ourselves rests on a set of facts heretofore dealt with from other standpoints, *i. e.*, that twenty of the thirty-five carriers in the district

do not operate rails within the district which cross the state line. Among such lines, for example, is the Chicago & North Western Railway, which operates largely in the extreme northwestern corner of the district. The order sought to be enjoined purports to require that the Chicago & North Western charges as a minimum on its one-line hauls the rates approved as maximum for the interstate one-line hauls on the lines of the eight carriers who do operate across the state line, as, for example, the line of the Pennsylvania, whose lines are largely in the southern half of the district. Clearly, however, the Chicago & North Western is not responsible for the one-line rates of the Pennsylvania, nor is the Pennsylvania in control of or responsible for the one-line rates of the Chicago & North Western. Since an order directed to unjust discrimination operates *upon a relation of rates*, the carrier against whom it is directed must have in its control both the rate alleged to be too high and the rate alleged to be too low. In the absence of such a common control an order directed to the relation of rates is void and must be set aside. Such was the recent holding of this Court in *Texas & Pacific R. Co. v. United States*, 289 U. S. 627, in which an order directed to the relationship of rates between New Orleans and Galveston, on the one hand, and interior points, on the other, was set aside in so far as the Texas & Pacific Railroad is concerned due to the fact that the Texas & Pacific was not responsible for and did not control the rates to both New Orleans and Galveston.

As is shown in the tariffs listed in Appendix "I" to the bill of complaint, (R., 419.), the Chicago and North Western Railway and the other lines which operate within the district exclusively in the State of Illinois, have relied upon the order complained of as their authority for disregarding the findings and orders of the Illinois and Indiana com-

missions. Their action in so doing is lawful only if the order of the Commission complained of is lawful.

In order to make our point let us assume that the Chicago and North Western had declined to increase its switching rates within the district for 1-line hauls and a suit was brought to compel it so to do. That carrier then defends on the ground that as to its 1-line rates there could be no discrimination in fact against interstate commerce because it neither controlled nor maintained any 1-line interstate rate for switching service within the district. Do counsel for appellees contend that the Chicago and North Western could not successfully defend against the order on the ground stated? Unless they do so contend, they must admit that the order complained of is invalid as applied to the 1-line rates of those carriers who do not engage in 1-line hauls of interstate commerce within the district.

VII.

The order of the Commission holding that the intrastate rates on grain switching constituted discrimination against interstate commerce is void for the following reasons:

(A) IT IS BASED ON ITS FORMER ORDER OF JULY 31, 1931, WHICH WAS VOID BECAUSE THERE WAS NO SUBSTANTIAL EVIDENCE IN THE RECORD TO SUPPORT A FINDING JUSTIFYING ANY INCREASES IN THE THEN EXISTING INTERSTATE GRAIN SWITCHING RATES;

(B) IT WAS BASED UPON A MISCONCEPTION OF THE ISSUES INVOLVED WITH RESPECT TO THE GRAIN SWITCHING RATES AND A MISINTERPRETATION OF THE POWERS DELEGATED TO IT BY THE INTERSTATE COMMERCE ACT AND WAS IN DIRECT VIOLATION OF SECTION 15 (7) OF THE INTERSTATE COMMERCE ACT.

(A)

The finding of the Commission in the 13th Section case (R., 166) that the lower intrastate rates result in unjust discrimination against interstate commerce is by its terms predicated upon the Commission's previous finding (R., 76) that the 3, 3.5, and 4-cent rates (minimum 60,000 pounds) for 1-line, 2-line, and 3-or-more-lines, respectively, were not, and would not for the future be, unreasonable for application on all of the commodities switched within the Chicago district, except railway equipment on its own wheels. We have already pointed out (*ante*, pp. 95-98) that there was no finding (as there should have been) that the intrastate switching rates were less than just and reasonable rates. It therefore follows of necessity that if the order of the Commission of July 31, 1931, based on its finding that the interstate switching rates approved by it for interstate transportation in switching service, was void, then the whole case must fall of its own weight.

It is our contention that the Commission's order of July 31, 1931, as to the grain switching rates was void because there was no substantial evidence in the record to support the finding upon which it was based.

Not a single witness for any individual railroad testified at any of the hearings in justification of any increases in the grain switching rates. (R., 477; Tr., 116.) This is an extremely important fact. Prior to the Commission's order, the grain switching rates within the Chicago switching district were not joint rates. (R., 694; Tr., 946.) Each individual railroad published its own per car rates in its own tariff, and the switching rates of the different railroads were not uniform in amount, but varied in amount as to each railroad and as to the character of the service via each railroad, whether inbound or outbound to or from connecting lines of railroad and elevators or mills, or where the complete switching service from one elevator or mill to another was performed by a single railroad. The switching rate published by each individual carrier accorded with the particular operating and physical conditions of its railroad. (*Ante*, p. 33.) Where more than one line of railroad was involved in a switching movement, the total charge assessed was ascertained by adding together the individual rates of each railroad and such joint haul switching rates on grain do not come within the terms of the Lowrey switching tariffs which are published for account of all the railroads in one tariff by Agent C. W. Galligan, who was the principal spokesman for all the railroads at the hearing. Witness Galligan, therefore, was not qualified to speak for the individual carriers with respect to their individual grain switching rates, and he, as joint agent for the publication of the Lowrey tariffs, did not claim to have any knowledge of the varying transportation conditions of the individual railroads which pub-

lished single-line grain switching rates. (R., 762, 763; Tr., 1225.)

In order to ascertain the reasonableness of any particular grain switching rate of any individual carrier or carriers within the Chicago switching district, it is necessary to examine into the circumstances and conditions surrounding the grain switching traffic via each line, and we contend that the cost study representing a composite statement or average of switching rates throughout the Chicago switching district on 69 groups of commodities, is not a test either of the cost of or reasonableness of the grain switching rate of any individual carrier.

Grain having been carried as an exception to the all-commodity basis from the date of the Lowrey agreement continuously for approximately twenty years, and no witness for any railroad having testified as to the justification for any increases in its separately published grain switching rate, the only other evidence which could even remotely tend to justify increases in these individual per-car grain switching rates was the cost study. Elsewhere in this brief (*ante*, pp. 109-117) we have fully discussed the imperfections of the cost study and its inadequacy as evidence upon which the Commission could make a finding as to the reasonableness or unreasonablenes of all-commodity switching rates, intrastate or interstate, in the Chicago switching district.

In addition to what has already been said herein with respect to this cost study, it could not in our opinion have any possible bearing upon the reasonableness or unreasonableness of grain switching rates, either interstate or intrastate, within the Chicago switching district, for the following reasons:

(1) It was definitely stated by Witness Galligan that "The cost study and exhibits filed in connection therewith were considered by the carriers as justifying the rates

that they had published and filed and that are now under suspension'' (R., 477; Tr., 115) *i. e.*, the rates contained in the Lowrey tariffs. No tariffs had ever been published and filed with either the Interstate or State Commissions, naming increased switching rates on grain, and consequently none was under suspension. (R., 678; Tr., 906.) In addition to this, as the Commission itself pointed out in its first report (R., 56), ''The carriers' proposed adjustment originally did not include the rates on grain, but at the later hearings a general readjustment of these rates to the full all-commodity basis was proposed.'' The mere proposal, however, of the railroads (after the hearings commenced) without evidence to support it, was insufficient to justify increases in the grain switching rates.

(2) The railroads themselves did not consider the cost study as evidence to justify increases in the grain rates, because, as explained, the individually published per-car grain switching rates, varying in amount on the different lines of railroads and varying according to the character of services performed, had been in effect continuously for many years, and although the cost study had been completed (pursuant to the Commission's order of May 25, 1927) before the hearing commenced in Docket 19610, the carriers did not at that time (January 11, 1928) propose any increases in the grain switching rates. (R., 475; Tr., 108, 109.) Obviously, had the railroads themselves considered the cost study as justification for proposed increases in the grain switching rates, they would have made their proposal at the time of the first hearing because at that time they had in their possession all the information as to costs developed by the cost study.

(3) At no time during the entire period of these protracted proceedings did any of the individual railroads file any tariffs with either the Illinois or Indiana State

Commissions, proposing to increase the intrastate grain switching rates within Illinois or within Indiana. (R., 332, 1091, 1118; Tr., 2844, 2931.) We urge that this is an important point to be considered in this case because of the fact that all of the information derived from the cost study was in the possession of the carriers prior to the first hearing (January 11, 1928) and because of the further fact that the great preponderance of the grain switching movement within the Chicago switching district, is entirely within the State of Illinois. (R., 683; Tr., 917.) Had the carriers filed tariffs with the Illinois and Indiana State Commissions, proposing to increase the intrastate grain switching rates, these commissions would have been given the opportunity to determine for themselves the reasonableness of said proposed increases. In this connection it should be borne in mind, as was said by this Court in *Florida* v. *United States*, 282 U. S. 194, at page 214:

> "The authority to determine the reasonableness *per se* of the intrastate rates lay with the State authorities and not with the Interstate Commerce Commission."

(4) The rate comparisons cited by the Commission in its report are not evidence in this case and cannot support the finding. (See *ante*, pp. 118-122.)

In its original report (R., 69) the Commission stated that it could not accept the cost study as a definite yardstick by which alone to measure the reasonableness of the rates under consideration, but in addition must apply other tests to determine their reasonableness. The other tests which it applied were not founded upon any evidence in the record in this case, but were merely comments upon certain former decisions of the Commission wherein it had prescribed distance scale rates on various commodities, including brick and related articles; sand, gravel, crushed stone, iron, steel, etc.

These comparisons not only were not evidence but their inclusion in the report was directly in conflict with the rule laid down by this Court in *United States* v. *Abilene & S. R. Co.*, 265 U. S. 274, at page 288, wherein it said (L. ed. page 1023): "Nothing can be treated as evidence which is not introduced as such." In that case this Court set aside an order of the Interstate Commerce Commission because its finding was predicated upon data taken from the annual reports filed pursuant to law with the Commission by the plaintiff carriers, and these annual reports were not formally put in evidence.

What we have said with respect to the cost study does not go to the weight of the evidence, but to the absence of it. This Court has definitely decided, that it will not substitute its judgment for that of the Commission as to the facts in the case, where there is substantial evidence to support a finding of the Commission. Our position is that the cost study is not substantial evidence to justify any increases in the grain switching rates. Upon this point we believe that the case of *Florida East Coast Ry. Co.* v. *U. S.*, 234 U. S. 167, is controlling. In that case this Court reversed the decree of the Commerce Court, upholding an order of the Interstate Commerce Commission, reducing certain rates on citrus fruits and vegetables on the Florida East Coast Line. There was testimony in the record with reference to the Atlantic Coast Line and the Seaboard Air Line (but none as to the East Coast Line), to the effect that on those roads there was a saving in expense and an increase in earning capacity because of the fact that carload shipments had greatly increased, and on account of heavier loading, and this Court, speaking through Mr. Chief Justice White, said on page 187:

> "Thus, by analysis, the case comes to this: Did the facts as to the increased loading which the Commission found to exist in the case of the Seaboard Air

> Line and the Atlantic Coast Line support or tend to support the order as to the East Coast Line in the absence of all testimony in the record concerning the existence of such fact as to the traffic on that road? In other words, the question is, Because there was testimony as to the traffic of those roads, can such testimony be said to tend to establish the same condition on the East Coast Line? Conceding that, from an abstract point of view, an affirmative answer would have to be given to such question, we think such is not the case here for the following reasons: (a) because of the difference in business carried on by the two roads named and the East Coast Line, they being not only gatherers of the local product, but trunk line carriers; (b) because of the difference in the situation and traffic of the two trunk lines named and the East Coast Line, as deduced solely from the peculiar environment and movement of business on that road so aptly stated in the passages from the reports of the Commission which we have quoted."

Applying the ruling of the above case to the case at bar, did the facts as to the cost study of commodities generally, which by the carriers' admission was considered by them as justifying solely the rates under suspension (R., 477; Tr., 115) support or tend to support the reasonableness of varying individual grain switching rates in the absence of all testimony in the record concerning the transportation conditions surrounding the grain switching movement, bearing in mind that the grain switching rates from the very beginning had been carried as an exception to the all-commodity Lowrey basis?

(B)

The order of the Commission of July 31, 1931, was based upon a misconception of the issues involved with respect to the grain switching rates and a misconstruction of the powers delegated to it by the Interstate Commerce Act.

The sole issue before the Commission with respect to

the grain switching rates was whether or not the carriers had sustained the burden of proof imposed upon them by Section 15 (7) of the Interstate Commerce Act and had justified the increases.

The case was tried by the railroads upon the theory that all that was required of them was to prove what should be a general basis of rates throughout the Chicago switching district, and if any individual road had commodities which it desired to be excepted from the general basis it was incumbent upon that individual road to show that such excepted commodity should be treated differently from the general basis. A definite statement to that effect was made by counsel for the carriers. After counsel had made this statement, Mr. Slater, representing the Illinois Commerce Commission, aptly replied that this proposition of the carriers would shift the burden from the carriers back to the shippers. (R., 765; Tr., 1232.)

This mistaken conception of the issues involved was shared both by the presiding Commissioner and the presiding Examiner. Chairman Campbell made the following statement (R., 764, 5; Tr., 1230):

> "The point is. You propose a Lowrey basis; propose to increase all rates as [up] to the Lowrey basis except where you make exceptions. If you make these exceptions without showing any reason, can the Commission recognize those exceptions or should it not use such exceptions for the purpose of showing that you have not justified the increase on other commodities. That is the point."

And Examiner Faul said (R., 763; Tr., 1226):

> "Well, I am asking for general information from this standpoint. Suppose, when the Commission comes to decide this case it should determine to put all commodities under the Lowrey basis and it had no testimony on some one particular commodity that you propose to except, it would require some testimony and it seems to me we should have some before we can

except any one particular commodity if you are going to have a general Lowrey basis for all rates."

It is believed that the Commission itself fell into the same error in its finding in the *First Report* as to the reasonableness of the proposed increases (R., 75), *which is predicated upon and qualified by* the statement that "All of the parties, both shippers and carriers, were practically unanimous in contending for the establishment of an all-commodity basis to apply throughout the Chicago switching district."

There is no justification in law for the Interstate Commerce Commission to predicate a finding upon that qualification, and nothing short of a unanimous agreement of all shippers could justify such a finding unless it was otherwise in accordance with the powers of the Commission under the Interstate Commerce Act. The original Lowrey basis, as explained, was the direct result of a contractual agreement between carriers and shippers known as the Lowrey agreement, which was signed in 1910, and from the very inception of that agreement grain was carried as an exception to the all-commodity basis. The grain shippers never have agreed that grain should be included in the all-commodity basis. (R., 825; Tr., 1462.)

The Interstate Commerce Commission has no other powers than those delegated to it by the Interstate Commerce Act, and Section 15 (7) of that Act expressly imposes upon the carriers the burden of proof to justify any proposed rate, fare or charge.

The individually published grain switching rates are "rates, fares, or charges" within the meaning of Section 15 (7). It is urged that the Commission in its order with respect to the grain switching rates has totally ignored Section 15 (7), and has arbitrarily, without evidence to support its finding, included all these varying individual

line per-car switching rates in an all-commodity basis, regardless of the fact that for twenty years or more prior to its decision grain had been carried on lower rates than the all-commodity basis. (R., 699-700; Tr., 967-968.) Presumably its order was predicated on the theory expressed by it in its *Second Report* (R., 160), wherein it said:

> "The testimony indicated that a uniform basis of rates, both interstate and intrastate, within the Chicago district is desirable."

We contend that the Commission has no power to include grain in the all-commodity basis simply because it thinks it is desirable that there should be an all-commodity basis. Whether such a basis would be desirable or undesirable, the Commission cannot authorize increases in individually published grain switching rates unless the individual carriers have justified those increases in accordance with the mandate of Section 15 (7) of the Interstate Commerce Act.

Under the Interstate Commerce Act the duty rests upon the Interstate Commerce Commission to establish just and reasonable rates. It was its duty in this case to establish just, reasonable and non-discriminatory grain switching rates within the Chicago switching district, not on any theory that grain should be included in the all-commodity basis, but rather on the merits of the case as to grain. The tests to be applied by the Commission are the ordinary and usual tests which it employs in the consideration of the reasonableness of any given rate, and in the original case none of these tests was applied to the consideration of the reasonableness *per se* of the grain switching rates.

This Court, in the case of *Beaumont S. L. and W. R. Co. v. U. S.*, 282 U. S. 74, on page 86, said:

> "Complete statements by the Commission showing the grounds upon which its determinations rest are

> quite as necessary as are opinions of lower courts setting forth the reasons on which they base their decisions in cases analogous to this. *Wichita R. & Light Co.* v. *Public Utilities Commission,* 260 U. S. 48, 58, 67 L. ed. 124, 130, 43 S. Ct. 51. And we have recently emphasized the duty of such courts fully to state the grounds upon which they act."

Applying the above principle to the report of the Commission in this case, we find that in spite of the Commission's admission (R., 57) that "it will be seen that an increase in the present rates on grain to the proposed all-commodity basis would be a very considerable increase," there is no evidence cited in the report to support a finding that any or all of the individual railroad's grain switching rates of varying amounts should be made uniform and thrown into one common pot with the all-commodity rates.

The single-line switching rates vary in amounts from $4.95 per car to $9.90 per car. (R., 680; Tr., 911.) While it is true, as pointed out by the Commission (R., 57) that the bulk of the grain within the district moves on lower rates than most other commodities, it is likewise true that these rates had been in effect continuously for more than twenty years.

The Commission has many times held, and it is a well-recognized rule, that rates voluntarily established by the carriers, and which have been in effect for a long period of time, are presumed to be reasonable until the contrary has been proved.

In *Coxe Bros. & Co.* v. *Lehigh Valley R. Co.,* 4 I. C. R. 535, 582, the Commission said a railroad company by putting in force a rate of charges furnishes evidence that the rate is profitable, which is more convincing when such rate is long maintained.

In *National Hay Association* v. *Lake Shore and Michigan*

Southern R. Co., 9 I. C. R. 264, it held that where 6th class rates on hay and straw were maintained for 13 years that fact was *prima facie* evidence that such rates were reasonably high.

And in *Anaconda Copper Mining Co.* v. *Director General*, 57 I. C. C. 723, 729, it again said:

> "We have frequently held that a prima facie presumption of reasonableness attaches to a rate that has been long voluntarily maintained."

There were good reasons why grain was excepted from the all-commodity basis under the Lowrey agreement. (R., 700; Tr., 968.) It must be assumed that the traffic executives of the carriers recognized that the transportation characteristics surrounding the movement of grain differed materially from the transportation characteristics of commodities generally, otherwise it would seem to follow that the traffic executives of each and every railroad within the Chicago switching district and their successors in office from 1910 down to the second hearing in Docket 19610 (commenced May, 1928) were either grossly ignorant of transportation conditions surrounding the grain switching movement or unmindful of the interests of their stockholders and of the public.

However, there is affirmative evidence in this record justifying grain switching rates different from the rates on other commodities (R., 685, 829; Tr., 921, 922, 1474), and also that the grain switching rates within the Chicago district are reasonable in comparison with the rates at other grain markets. (R., 821, 824; Tr., 1453, 1460.)

And so the case has come to this, that notwithstanding the presumption of reasonableness attached to rates, which have been voluntarily established and long continued, and notwithstanding that Section 15 (7) of the Interstate Commerce Act expressly places the burden of proof upon the

carriers to prove that the grain switching rates are just and reasonable, nevertheless there was not the slightest attempt on their part to assume the burden of proof or to rebut the prima facie reasonableness of the grain switching rates arising from their voluntary and long continued existence.

If, at the hearing in Docket 19610, the defendant railroads had assumed the burden of proof, which was placed upon them by Section 15 (7) of the Interstate Commerce Act, and which the Interstate Commerce Commission should have compelled them to assume, we apprehend that on cross-examination their witness or witnesses would have met with insurmountable difficulty in justifying increases in the grain switching rates which the Commission admits are "very considerable." (R., 57.)

We respectfully urge that the grain shippers represented by this plaintiff, Board of Trade of the City of Chicago, have not had their day in court, because they were denied the opportunity of cross-examining witnesses, who, under proper procedure would have been produced to testify as to the reasons why grain having so long been carried as an exception to the Lowrey basis, should now be increased up to the all-commodity basis; therefore, the order of the Interstate Commerce Commission of July 31, 1931, is void.

The fact that the investigation instituted by the Commission in Docket 19610 was on its own initiative does not in any manner change the law governing this case. (Compare *U. S.* v. *Abilene & S. R. Co.*, 265 U. S. 274, at page 288-289.) The Interstate Commerce Commission derives its power to enter upon a general investigation of rates by virtue of paragraph 2 of Section 13 of the Interstate Commerce Act, and it has no other or greater power under that section of the Act than if the matter had arisen upon

formal complaint. Par. 2 of Section 13 of the Act does not repeal Par. 7 of Section 15, which definitely places the burden of proof upon the defendant railroads to justify rates increased after January 1, 1910, or "sought to be increased after the passage of this Act."

As was said by this Court in *Interstate Commerce Commission* v. *L. & N. R. Co.*, 227 U. S. 88, at page 93:

> "The Commission is an administrative body and, even where it acts in a quasi judicial capacity, is not limited by the strict rules, as to the admissibility of evidence, which prevail in suits between private parties. *Interstate Commerce Commission* v. *Baird*, 194 U. S. 25, 48 L. ed. 860, 24 Sup. Ct. Rep. 563. But the more liberal the practice in admitting testimony, the more imperative the obligation to preserve the essential rules of evidence by which rights are asserted or defended. In such cases the Commissioners cannot act upon their own information, as could jurors in primitive days. All parties must be fully apprised of the evidence submitted or to be considered, and must be given opportunity to cross-examine witnesses, to inspect documents, and to offer evidence in explanation or rebuttal. In no other way can a party maintain its rights or make its defense. In no other way can it test the sufficiency of the facts to support the finding; for otherwise, even though it appeared that the order was without evidence, the manifest deficiency could always be explained on the theory that the Commission had before it extraneous, unknown, but presumptively sufficient information to support the finding. *United States* v. *Baltimore & O. S. W. R. Co.*, 226 U. S. 14, *ante* 104, 33 Sup. Ct. Rep. 5.
>
> As these contentions of the government must be overruled, it is necessary to examine the record with a view of determining whether there was substantial evidence to support the order."

In the grain case, *A. T. & S. F. R. Co.* v. *U. S.*, 284 U. S. 248, at page 262, Mr. Chief Justice Hughes said:

> "But the Commission, exercising a delegated regu-

latory authority which does not have the freedom of ownership, operates in a field limited by constitutional rights and legislative requirements."

VIII.

The difference between intrastate rates on one hand and interstate rates on the other hand is justified by the difference between intrastate service and interstate service.

Elsewhere we have shown the lack of evidence as to similarity of conditions intrastate and interstate. We now call attention to the evidence affirmatively showing that there is a difference in service interstate and intrastate amply justifying the difference in rates.

Chairman Farrell, dissenting in part from the report of the Commission in the instant case, stated (195 I. C. C. 119; R., 167):

> "I dissent from the majority's conclusion that unjust discrimination against interstate commerce results from the fact that the Indiana and Illinois intrastate switching rates involved are somewhat lower than the interstate switching rates covered by the majority report, because, in my opinion, these disparities in rates, as shown by statements of fact included in the report, are justified by differences in the transportation services, performed by the carriers, to which the rates are applied.
>
> I am authorized to state that Commissioner Aitchison joins in this expression."

In the second report, the Commission, in considering the relative service intrastate and interstate dealt only with the cost study cars. Elsewhere we show that these cost study cars do not reflect the relation of service in any proper degree, intrastate to interstate.

In the following table we show separately the rates found reasonable by the Commission in its *First Report* of

July 31, 1931, for application to the switching of interstate traffic for 1-line, for 2-line and for 3-or-more-line hauls, and the rates which were in effect on Illinois intrastate and on Indiana intrastate switching and which were required by the Commission to be raised to the interstate level. In the final column we show the percentage which the intrastate rate bore to the interstate rate on July 3, 1933:

	RATES			Percentage intrastate of interstate rate
	Interstate	Intrastate		
		Illinois	Indiana	
1-line	3.	2.5	2.5	83.3
2-line	3.5	2.5	2.5	71.
3-line	4.	3.	3.	75.

In the following table we show the average haul interstate and the average haul intrastate for all of the carriers and for all of the traffic moved in September, 1926, together with the percentage which the intrastate average hauls are of the average interstate haul for the three lengths of haul:

	Average haul Interstate	Illinois		Indiana	
		Average haul	Percentage of interstate haul	Average haul	Percentage of interstate haul
1-line	15.3	7.4	48	6.1	40
2-line	28.7	15.8	55	7.2	25
3-line	33.6	22.7	68	...	..

It will be noted from the foregoing table that in all instances the percentage relationship of the average haul intrastate, both in Indiana and in Illinois, to the average haul interstate, is considerably less than the percentage relationship of the intrastate rate to the applicable interstate rate as set forth in the first table under this heading.

Each excess mile of haul of the interstate traffic over the intrastate traffic represents a large investment in track,

right of way, ties, etc. In a table set forth on page 132 hereof we show the investment in mile of track for the switching roads; there the investment per mile of track for the B. & O. Chicago Terminal is shown as $101,000. The average 1-line interstate haul of 15.3 miles would require $1,545,300 investment and the average 1-line Illinois intrastate haul of 7.4 miles would require $747,400 investment. There is also an additional cost for maintenance, upkeep and repair for each mile used in performing the interstate service in excess of the intrastate service, as well as an additional fuel, wage and equipment cost for operation for the additional haul.

It has long been recognized that a comparison of rates must reflect the comparison in service; to put it as the Commission said as long ago as 1891, in *Coxe Brothers & Co.* v. *Lehigh Valley R. R. Co.*, 4 I. C. R. 535, at 560:

> "Ordinarily there is no better criterion for reasonable charges than that which is in proportion to the service rendered;"

So that in determining the reasonableness of intrastate rates for switching service in Illinois and in Indiana in relation to the interstate rates for switching service within the district, we find that the difference in rates, intrastate and interstate is much less than the difference in service performed intrastate and the service performed interstate, or to put it in another form, relative service concerned, the carriers charge more for performing intrastate switching in Illinois and in Indiana than they charge for the interstate switching between points in the switching district.

IX.

The Court erred in failing to find the facts specially and to state separately its conclusions of law thereon, as required by Equity Rule 70½.

Equity Rule 70½ provides:

> "In deciding suits in equity, including those required to be heard before three judges, the court of first instance shall find the facts specially and state separately its conclusions of law thereon; and its findings and conclusions shall be entered of record and, if an appeal is taken from the decree, shall be included by the clerk in the record which is certified to the appellate court under rules 75 and 76."

On November 3, 1933, the District Court filed its findings of fact and propositions of law. The findings of fact (R., 1307 to 1315) are mere statements of the various steps taken in the case and a description of the parties thereto. In Paragraph VIII (R., 1315) it is stated:

> "A part of the evidence presented to the Interstate Commerce Commission in justification of the measure of what the rates within the Chicago switching district should [be] in the hearing in Docket 19610, prior to the Commission's order of July 31, 1931, consisted of a cost study. Other evidence in addition to the cost study, was offered and received with respect to said switching rates both state and interstate within the Chicago switching district. The protestants in Docket 19610, and related cases, including the plaintiffs herein, offered evidence in opposition to the said cost study."

The Court nowhere makes any findings of fact as to the evidence before the Commission which the bill of complaint alleges constituted no basis for the finding of the Commission. The propositions of law which the court holds, are eight separate sentences, which constitute no more than a denial of the allegations of the bill of complaint. The first

of the propositions is that the Commission's denial of plaintiffs' motions of January 28th and February 3rd for a different cost study, did not constitute an abuse of discretion or denial of a full hearing. The second proposition is that the order of the Commission "is supported by sufficient evidence" but nowhere is there any statement of what the evidence is that could possibly support the Commission's order. Paragraph 3 states that the order of the Commission contains adequate findings of fact, but these findings are not referred to, and there is no statement of what findings should be made in order to constitute an adequate finding. Similarly, the remaining propositions are mere conclusions of the Court and there is no discussion of any provision of the statutes, nor any reference to any decision of any court.

So we submit that the findings of fact and propositions of law filed November 3, 1933, do not comply with Equity Rule 70½. It may be that appellants have no right to complain of the failure of the District Court to comply with Rule 70½, but we believe that it would have been of assistance to counsel for appellants in determining the course they desired to take and in presenting their case in this Court if they could have known what facts and what law controlled the Court in its final decree dismissing the bill of complaint.

This Court discussed Equity Rule 70½ in *Public Service Commission of Wisconsin* v. *Wisconsin Telephone Co.*, 289 U. S. 67, 77 L. ed. 1036, pointing out the importance of a statement by the District Court of the grounds of decision, both as to facts and law "as an aid to litigants and to this Court." There the District Court rendered no opinion and apart from a general statement declaring that prescribed rates were confiscatory, made no finding of fact, and no statement of the grounds of the decision, either as to facts

or law contemplated by the Rule and required by good practice. This Court vacated the decree, and the cause was remanded for findings and conclusions appropriate to a decision upon an application for an interlocutory injunction, the temporary restraining order remaining in force pending that determination.

Like action was taken in *Public Service Commission of Indiana* v. *Northern Indiana Public Service Co.*, 289 U. S. 703, 77 L. ed. 1460, an appeal from the District Court of the United States for the Northern District of Indiana.

Appellants bring this matter to the attention of the Court by assignment of error, but they specifically pray that action by this Court shall not extend to a remanding of the case to the District Court for special findings of fact and conclusions of law thereon appropriate to the decision as required by Equity Rule 70½, as such action could only result in delay in determining the validity of the Commission's order of July 3, 1933.

APPENDIX A.

Pertinent provisions of the Interstate Commerce Act.

SECTION 2.

Sec. 2 (As amended February 28, 1920), (U. S. Code, title 49, sec. 2). That if any common carrier subject to the provisions of this Act shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property or the transmission of intelligence, subject to the provisions of this Act, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation or transmission of a like kind of traffic or message under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful.

SECTION 3.

Sec. 3 (As amended February 28, 1920, and March 4, 1927). (U. S. Code, title 49, sec. 3). (1) That it shall be unlawful for any common carrier subject to the provisions of this Act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

SECTION 13, PARAGRAPHS 2, 3 AND 4.

Sec. 13 (As amended June 18, 1910 and February 28, 1920): (U. S. Code, title 49, sec. 13). (2) Said Commission shall, in like manner and with the same authority and powers, investigate any complaint forwarded by the railroad commissioner or railroad commission of any State or Territory at the request of such commissioner or commission, and the Interstate Commerce Commission shall have full authority and power at any time to institute an inquiry, on its own motion, in any case and as to any matter or thing concerning which a complaint is authorized to be made, to or before said Commission by any provision of this Act, or concerning which any question may arise under any of the provisions of this Act, or relating to the enforcement of any of the provisions of this Act. And the said Commission shall have the same powers and authority to proceed with any inquiry instituted on its own motion as though it had been appealed to by complaint or petition under any of the provisions of this Act, including the power to make and enforce any order or orders in the case, or relating to the matter or thing concerning which the inquiry is had excepting orders for the payment of money. No complaint shall at any time be dismissed because of the absence of direct damage to the complainant.

(3) Whenever in any investigation under the provisions of this Act, or in any investigation instituted upon petition of the carrier concerned, which petition is hereby authorized to be filed, there shall be brought in issue any rate, fare, charge, classification, regulation, or practice, made or imposed by authority of any State, or initiated by the President during the period of Federal control, the Commission, before proceeding to hear and dispose of such issue, shall cause the State or States interested to be notified of the proceeding. The Commission may confer with the authorities of any State having regulatory jurisdiction over the class of persons and corporations subject to this Act with respect to the relationship between rate structures and practices of carriers subject to the jurisdiction of such State bodies and of the Commission; and

to that end is authorized and empowered, under rules to be prescribed by it, and which may be modified from time to time, to hold joint hearings with any such State regulating bodies on any matters wherein the Commission is empowered to act and where the rate-making authority of a State is or may be affected by the action taken by the Commission. The Commission is also authorized to avail itself of the cooperation, services, records, and facilities of such State authorities in the enforcement of any provision of this Act.

(4) Whenever in any such investigation the Commission, after full hearing, finds that any such rate, fare, charge, classification, regulation, or practice causes any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce, which is hereby forbidden and declared to be unlawful, it shall prescribe the rate, fare, or charge, or the maximum or minimum, or maximum and minimum, thereafter to be charged, and the classification, regulation, or practice thereafter to be observed, in such manner as, in its judgment, will remove such advantage, preference, prejudice, or discrimination. Such rates, fares, charges, classifications, regulations, and practices shall be observed while in effect by the carriers parties to such proceeding affected thereby, the law of any State or the decision or order of any State authority to the contrary notwithstanding.

SECTION 15 (7).

Sec. 15 (As amended June 29, 1906, June 18, 1910, February 28, 1920, and March 4, 1927). (U. S. Code, title 49, sec. 15.) (7) Whenever there shall be filed with the Commission any schedule stating a new individual or joint rate, fare, or charge, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare, or charge, the commission shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint, at once,

and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, charge, classification, regulation, or practice; and pending such hearing and the decision thereon the commission, upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, but not for a longer period than seven months beyond the time when it would otherwise go into effect; and after full hearing, whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made within the period of suspension, the proposed change of rate, fare, charge, classification, regulation, or practice shall go into effect at the end of such period; but in case of a proposed increased rate or charge for or in respect to the transportation of property, the Commission may by order require the interested carrier or carriers to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a rate, fare, or charge increased after January 1, 1910, or of a rate, fare, or charge sought to be increased after the passage of this Act, the burden of proof to show that the increased rate, fare, or charge, or proposed increased rate, fare, or charge, is just and reasonable shall be upon the carrier, and the commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible.

SECTION 15a. REPEALED JUNE 16, 1933.

Sec. 15a (Added February 28, 1920) (U. S. C. A., title 49, sec. 15a). (1) When used in this section the term "rates" means rates, fares, and charges, and all classifications, regulations, and practices, relating thereto; the term "carrier" means a carrier by railroad or partly by railroad and partly by water, within the continental United States, subject to this Act, excluding (a) sleeping-car companies and express companies, (b) street or suburban electric railways unless operated as a part of a general steam railroad system of transportation, (c) interurban electric railways unless operated as a part of a general steam railroad system of transportation or engaged in the general transportation of freight, and (d) any belt-line railroad, terminal switching railroad, or other terminal facility, owned exclusively and maintained, operated, and controlled by any State or political subdivision thereof; and the term "net railway operating income" means railway operating income, including in the computation thereof debits and credits arising from equipment rents and joint facility rents.

(2) In the exercise of its power to prescribe just and reasonable rates the Commission shall initiate, modify, establish or adjust such rates so that carriers as a whole (or as a whole in each of such rate groups or territories as the Commission may from time to time designate) will, under honest, efficient and economical management and reasonable expenditures for maintenance of way, structures and equipment, earn an aggregate annual net railway operating income equal, as nearly as may be, to a fair return upon the aggregate value of the railway property of such carriers held for and used in the service of transportation: *Provided*, That the Commission shall have reasonable latitude to modify or adjust any particular rate which it may find to be unjust or unreasonable, and to prescribe different rates for different sections of the country.

(3) The Commission shall from time to time determine and make public what percentage of such aggregate property value constitutes a fair return thereon, and such percentage shall be uniform for all rate

groups or territories which may be designated by the Commission. In making such determination it shall give due consideration, among other things, to the transportation needs of the country and the necessity (under honest, efficient and economical management of existing transportation facilities) of enlarging such facilities in order to provide the people of the United States with adequate transportation: *Provided*, That during the two years beginning March 1, 1920, the Commission shall take as such fair return a sum equal to 5½ per centum of such aggregate value, but may, in its discretion, add thereto a sum not exceeding one-half of one percentum of such aggregate value to make provision in whole or in part for improvements, betterments or equipment, which, according to the accounting system prescribed by the Commission, are chargeable to capital account.

(4) For the purposes of this section, such aggregate value of the property of the carriers shall be determined by the Commission from time to time and as often as may be necessary. The Commission may utilize the results of its investigation under section 19a of this Act, in so far as deemed by it available, and shall give due consideration to all the elements of value recognized by the law of the land for rate-making purposes, and shall give to the property investment account of the carriers only that consideration which under such law it is entitled to in establishing values for rate-making purposes. Whenever pursuant to section 19a of this Act the value of the railway property of any carrier held for and used in the service of transportation has been finally ascertained, the value so ascertained shall be deemed by the Commission to be the value thereof for the purpose of determining such aggregate value.

(5) Inasmuch as it is impossible (without regulation and control in the interest of the commerce of the United States considered as a whole) to establish uniform rates upon competitive traffic which will adequately sustain all the carriers which are engaged in such traffic and which are indispensable to the communities to which they render the service of transportation, without enabling some of such carriers to receive a net railway operating income substantially and unrea-

sonably in excess of a fair return upon the value of their railway property held for and used in the service of transportation, it is hereby declared that any carrier which receives such an income so in excess of a fair return, shall hold such part of the excess, as hereinafter prescribed, as trustee for, and shall pay it to, the United States.

(6) If, under the provisions of this section, any carrier receives for any year a net railway operating income in excess of 6 per centum of the value of the railway property held for and used by it in the service of transportation, one-half of such excess shall be placed in a reserve fund established and maintained by such carrier, and the remaining one-half thereof shall, within the first four months following the close of the period for which such computation is made, be recoverable by and paid to the Commission for the purpose of establishing and maintaining a general railroad contingent fund as hereinafter described: For the purposes of this paragraph the value of the railway property and the net railway operating income of a group of carriers, which the Commission finds are under common control and management and are operated as a single system, shall be computed for the system as a whole irrespective of the separate ownership and accounting returns of the various parts of such system. In the case of any carrier which has accepted the provisions of section 209 of this amendatory Act the provisions of this paragraph shall not be applicable to the income for any period prior to September 1, 1920. The value of such railway property shall be determined by the Commission in the manner provided in paragraph (4).

(7) For the purpose of paying dividends or interest on its stocks, bonds or other securities, or rent for leased roads, a carrier may draw from the reserve fund established and maintained by it under the provisions of this section to the extent that its net railway operating income for any year is less than a sum equal to 6 per centum of the value of the railway property held for and used by it in the service of transportation, determined as provided in paragraph (6); but such fund shall not be drawn upon for any other purpose.

(8) Such reserve fund need not be accumulated and maintained by any carrier beyond a sum equal to 5 per centum of the value of its railway property determined as herein provided, and when such fund is so accumulated and maintained the portion of its excess income which the carrier is permitted to retain under paragraph (6) may be used by it for any lawful purpose.

(9) The Commission shall prescribe rules and regulations for the determination and recovery of the excess income payable to it under this section, and may require such security and prescribe such reasonable terms and conditions in connection therewith as it may find necessary. The Commission shall make proper adjustments to provide for the computation of excess income for a portion of a year, and for a year in which a change in the percentage constituting a fair return or in the value of a carrier's railway property becomes effective.

(10) The general railroad contingent fund so to be recoverable by and paid to the Commission and all accretions thereof shall be a revolving fund and shall be administered by the Commission. It shall be used by the Commission in furtherance of the public interest in railway transportation either by making loans to carriers to meet expenditures for capital account or to refund maturing securities originally issued for capital account, or by purchasing transportation equipment and facilities and leasing the same to carriers, as hereinafter provided. Any moneys in the fund not so employed shall be invested in obligations of the United States or deposited in authorized depositaries of the United States subject to the rules promulgated from time to time by the Secretary of the Treasury relating to Government deposits.

(11) A carrier may at any time make application to the Commission for a loan from the general railroad contingent fund, setting forth the amount of the loan and the term for which it is desired, the purpose of the loan and the uses to which it will be applied, the present and prospective ability of the applicant to repay the loan and meet the requirements of its obligations in that regard, the character and value of the security offered, and the extent to which the public

convenience and necessity will be served. The application shall be accompanied by statements showing such facts and details as the Commission may require with respect to the physical situation, ownership, capitalization, indebtedness, contract obligations, operation, and earning power of the applicant, together with such other facts relating to the propriety and expediency of granting the loan applied for and the ability of the applicant to make good the obligation, as the Commission may deem pertinent to the inquiry.

(12) If the Commission, after such hearing and investigation, with or without notice, as it may direct, finds that the making, in whole or in part, of the proposed loan from the general railroad contingent fund is necessary to enable the applicant properly to meet the transportation needs of the public, and that the prospective earning power of the applicant and the character and value of the security offered are such as to furnish reasonable assurance of the applicant's ability to repay the loan within the time fixed therefor, and to meet its other obligations in connection with such loan, the Commission may make a loan to the applicant from such railroad contingent fund, in such amount, for such length of time, and under such terms and conditions as it may deem proper. The Commission shall also prescribe the security to be furnished, which shall be adequate to secure the loan. All such loans shall bear interest at the rate of 6 per centum per annum, payable semiannually to the Commission. Such loans when repaid, and all interest paid thereon, shall be placed in the general railroad contingent fund.

(13) A carrier may at any time make application to the Commission for the lease to it of transportation equipment or facilities, purchased from the general railroad contingent fund, setting forth the kind and amount of such equipment or facilities and the term for which it is desired to be leased, the uses to which it is proposed to put such equipment or facilities, the present and prospective ability of the applicant to pay the rental charges thereon and to meet the requirements of its obligations under the lease, and the extent to which the public convenience and necessity will be served. The application shall be accompanied by statements showing such facts and details as the Commis-

sion may require with respect to the physical situation, ownership, capitalization, indebtedness, contract obligations, operation, and earning power of the applicant, together with such other facts relating to the propriety and expediency of leasing such equipment or facilities to the applicant as the Commission may deem pertinent to the inquiry.

(14) If the Commission, after such hearing and investigation, with or without notice, as it may direct, finds that the leasing to the applicant of such equipment or facilities, in whole or in part, is necessary to enable the applicant properly to meet the transportation needs of the public, and that the prospective earning power of the applicant is such as to furnish reasonable assurance of the applicant's ability to pay promptly the rental charges and meet its other obligations under such lease, the Commission may lease such equipment or facilities purchased by it from the general railroad contingent fund, to the applicant for such length of time, and under such terms and conditions as it may deem proper. The rental charges provided in every such lease shall be at least sufficient to pay a return of 6 per centum per annum, plus allowance for depreciation determined as provided in paragraph (5) of section 20 of this Act, upon the value of the equipment or facilities leased thereunder. All rental charges and other payments received by the Commission in connection with such equipment and facilities, including amounts received under any sale thereof, shall be placed in the general railroad contingent fund.

(15) The Commission may from time to time purchase, contract for the construction, repair and replacement of, and sell, equipment and facilities, and enter into and carry out contracts and other obligations in connection therewith, to the extent that moneys included in the general railroad contingent fund are available therefor, and in so far as necessary to enable it to secure and supply equipment and facilities to carriers whose applications therefor are approved under the provisions of this section and to maintain and dispose of such equipment and facilities.

(16) The Commission may from time to time prescribe such rules and regulations as it deems necessary to carry out the provisions of this section respecting

the making of loans and the lease of equipment and facilities.

(17) The provisions of this section shall not be construed as depriving shippers of their right to reparation in case of overcharges, unlawfully excessive or discriminatory rates, or rates excessive in their relation to other rates, but no shipper shall be entitled to recover upon the sole ground that any particular rate may reflect a proportion of excess income to be paid by the carrier to the Commission in the public interest under the provisions of this section.

(18) Any carrier, or any corporation organized to construct and operate a railroad, proposing to undertake the construction and operation of a new line of railroad may apply to the Commission for permission to retain for a period not to exceed ten years all or any part of its earnings derived from such new construction in excess of the amount heretofore in this section provided, for such disposition as it may lawfully make of the same, and the Commission may, in its discretion, grant such permission, conditioned, however, upon the completion of the work of construction within a period to be designated by the Commission in its order granting such permission.

PRESENT SECTION 15a.

Sec. 15a (As amended June 16, 1933, c. 91, title II, sec. 205, 48 Stat. 220):

(1) When used in this section, the term "rates" means rates, fares, and charges, and all classifications, regulations, and practices relating thereto.

(2) In the exercise of its power to prescribe just and reasonable rates the Commission shall give due consideration, among other factors, to the effect of rates on the movement of traffic; to the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management, to provide such service.

APPENDIX B.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1933.

ILLINOIS COMMERCE COMMISSION, ET AL., *Appellants,*
vs.
THE UNITED STATES OF AMERICA, ET AL., *Appellees.*
No. 787.

STIPULATION.

It appearing from an inspection of the printed transcript of record herein that there is not shown a copy of the motions filed on behalf of appellants herein with the Interstate Commerce Commission seeking an order requiring respondent railroad companies to conduct a cost study on all lines within the Chicago switching district for a representative period, and such motions having been presented to the District Court and considered at the hearing, and it being the desire of all parties that this Court shall have before it a copy of such motions, it is hereby stipulated that counsel for appellants shall print as an appendix to their brief a copy of this stipulation and a copy of the printed motion filed by the Illinois Commerce Commission on February 6, 1932, properly certified by the Secretary of the Interstate Commerce Commission.

It is further stipulated by and between counsel for the appellants and counsel for the appellees that an identical

motion, differing only in names of those making the motion and their counsel, was filed on January 30, 1932, by the Acme Steel Company, and others, and on March 8, 1932, by the Public Service Commission of Indiana.

It is further stipulated that the certified copy of motion filed February 6, 1932, shall be available for the consideration of this Court to the same extent as if it were printed as part of the record herein.

It is further stipulated that said motions, and each of them, were denied by the Interstate Commerce Commission in orders dated February 8, 1932, and March 14, 1932.

This stipulation shall be filed with the Clerk of this Court.

OTTO KERNER,
IRVIN ROOKS,
HARRY R. BOOTH,
PHILIP LUTZ, JR.,
HERBERT J. PATRICK,
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J. N. DAVIS,
Counsel for the Railroad Appellees.

March 29, 1934.

INTERSTATE COMMERCE COMMISSION

WASHINGTON

I, GEORGE B. MCGINTY, Secretary of the INTERSTATE COMMERCE COMMISSION, do hereby certify that the attached is true copy of Motion to Require Respondents to Conduct Cost Study on All Lines Within Chicago Switching District for Representative Period, filed by Illinois Commerce Commission on behalf of the State of Illinois, February 6, 1932, in Docket No. 19610, Switching Rates in the Chicago Switching District, the original of which is now on file and of record in the office of this Commission.

IN WITNESS WHEREOF I have hereunto set my hand and affixed the Seal of said Commission this 7th day of March, A. D. 1934.

(Signed) GEORGE B. MCGINTY,
Secretary of the Interstate Commerce Commission.

(Seal)

BEFORE THE

INTERSTATE COMMERCE COMMISSION

SWITCHING RATES IN THE CHICAGO SWITCHING DISTRICT. } No. 19610.

MOTION TO REQUIRE RESPONDENTS TO CONDUCT COST STUDY ON ALL LINES WITHIN CHICAGO SWITCHING DISTRICT FOR REPRESENTATIVE PERIOD.

Filed by Illinois Commerce Commission on behalf of the State of Illinois.

G. GALE GILBERT, Chairman,
J. PAUL KUHN,
WALTER H. WILSON,
WILLIAM M. BRINKMAN,
PHIL W. COLLINS,
PAUL SAMUELL,
Commissioners.

February 3, 1932.

BEFORE THE

INTERSTATE COMMERCE COMMISSION

SWITCHING RATES IN THE CHICAGO SWITCHING DISTRICT. } No. 19610.

MOTION TO REQUIRE RESPONDENTS TO CONDUCT COST STUDY ON ALL LINES WITHIN THE CHICAGO SWITCHING DISTRICT FOR REPRESENTATIVE PERIOD.

Now comes the Illinois Commerce Commission and moves the Commission to require the respondents herein to conduct a cost study as more specifically hereinafter set forth, and in support thereof show as follows:

I.

These proceedings were reopened by order of the Commission dated November 2, 1931,

> "for further hearing with respect to the relation of the rates and charges for switching in intrastate commerce to the rates prescribed for like switching

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in interstate commerce for the purpose of determining whether the adjustment of the interstate and intrastate rates and charges is unduly prejudicial to interstate shippers and traffic, and unjustly preferential of intrastate shippers and traffic, or unjustly discriminatory against interstate commerce, in violation of Section 13 of the Interstate Commerce Act, with a view to the entry of such order as may be necessary to correct such violation or violations as may be found to exist."

II.

Rates prescribed by your Commission for interstate hauls in the Chicago Switching District became effective on December 10, 1931. The decision of your Commission on July 31, 1931, 177 I. C. C. 669, was predicated almost entirely upon the result of a cost study made by certain of the respondents in 1927, as applied against a traffic test in September, 1926.

III.

The carriers' cost study now of record in this proceeding is defective in the following respects:

(a) The fifteen railroads participating in the cost study are not representative of the transportation situation throughout the Chicago Switching District.

(b) The period selected for the cost study by the respondents is not representative.

(c) The assignment of elements of service to each route was not based on any test of actual movement.

(d) The Saur-Coverston formula as applied for the determination of switching costs is defective, particularly as used in the determination of engine-hour and car-detention costs.

(e) The application of costs determined during varying periods of a single week of 1927 to the movement of cars shown in the traffic test for the month of September, 1926, is not a proper method for determining representative costs for switching in the Chicago District.

(f) The testimony as to cost relates wholly to a period not later than October 25, 1927, and the hearing was concluded on September 21, 1928.

Taking up these objections in the order above stated, we present the following salient facts:

(a) The fifteen railroads participating in the cost study are not representative of the transportation situation throughout the Chicago Switching District.

At no time has the cost study embraced more than fifteen railroads, although there are thirty-five railroads operating in the Chicago Switching District.

Your Commission has never directed that any particular lines be included in the study, but it denied the re-

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quest of counsel for the shippers that certain lines be included in the cost study.

On May 25, 1927, the Commission requested the respondents to submit a statement showing the cost of switching carload traffic within the Chicago Switching District, specifically directing that the car movement should be representative of traffic originating and terminating within such district, and in order that the expense of the cost study should not be prohibitive, suggested the selection of yards of

> "a limited number of carriers in which, or through which, are performed car movements which are representative of those to which the rates apply."

In response to this request the carriers selected the Indiana Harbor Belt, Baltimore & Ohio Chicago Terminal, Belt Railway, Elgin, Joliet & Eastern, Chicago & North Western, Pennsylvania, Chicago, Burlington & Quincy, and Chicago, Milwaukee & St. Paul, as the carriers to be studied; the week of August 4th to 10th was selected as the period in which the cost study would be taken for those particular lines. Further conference was had and on October 29, 1927, your Commission gave notice that the eight roads were not sufficiently representative of the entire movement; a further study was made during the period October 9th to 25th, 1927, by the Illinois Central, Chicago, Rock Island & Pacific, Chicago

Short Line, Chicago & Illinois Western, Chicago West Pullman and Southern, Illinois Northern, and the Pullman railroads, as well as a further study by the Pennsylvania Railroad.

All these last named seven lines had been embraced in a list of carriers which the shippers had insisted were necessary to add to the original eight lines in order that the cost study should be representative. In addition to those seven which were added, the shippers had requested that the Chicago River & Indiana (including the Chicago Junction) should be included in the cost study. This request was presented to the carriers by the Commission, but the carriers declined and failed to include any of the movements on the Chicago Junction. At the hearing, the carriers were advised by your Commission that the responsibility for a representative cost study rested upon the carriers and stated that they assumed the risk of not having a representative study.

The Chicago River & Indiana Railroad, operating its own line and the line leased from the Chicago Junction, is one of the most important switching roads in the Chicago Switching District. Its volume of traffic is great and the length of haul short. The average haul by the Chicago Junction of single-line cars, is 1.6 miles, and in September, 1926, it handled 1764 cars in single-line

movement, which was the largest number of cars handled by any single carrier in switching service in the Chicago District during that month, with the exception of the Indiana Harbor Belt. Of the total traffic moving in the Chicago Switching District in September, 1926, costs were applied to only 60.68% of the single-line cars, to 64.84% of the two-line cars, and 51.95% of the three-line cars. The average single-line haul of carriers included in the study was approximately ten miles intrastate, and 15 miles interstate.

It is most unfair for the carriers to present a cost study for lines carrying long hauls and to exclude a switching carrier which has so large a volume of cars moving for an average haul of only 1.6 miles. We particularly call attention to the exclusion of the Chicago Junction with its short hauls and the inclusion of the Elgin, Joliet & Eastern with its long hauls.

(b) The period selected for the cost study by the respondents is not representative.

The test periods used for the study were as follows:

Date	Carrier
June 15 to 21, 1927..	Chicago, Burlington & Quincy
	Chicago & North Western
Aug. 4 to 10, 1927...	Baltimore & Ohio Chicago Terminal
	Belt Railway of Chicago
	Chicago, Milwaukee & St. Paul
	Elgin, Joliet & Eastern
	Indiana Harbor Belt
Aug. 8 to 14, 1927...	Pennsylvania Railroad
Oct. 19 to 25, 1927...	Chicago, Rock Island & Pacific
	Chicago Short Line
	Chicago, West Pullman and Southern
	Chicago & Illinois Western
	Illinois Central
	Illinois Northern
	Pullman Railroad

There is no evidence of record as to the relation between the number of conductors or switching crews during the test period of one week on each of the fifteen roads to the total number of conductors and switching crews working per day during the average week of 1927. Neither does the record reveal the relative volume of work performed during this week as compared with the total work performed by each carrier during the year.

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A test period of only seven days, and that not the same for each of the study roads, is entirely too short upon which to base a determination so important as the unit cost of service in the Chicago Switching District. This defect in a cost study was recognized by the decision of your Commission in *Boston Wool Trade Association* v. *Director General*, 69 I. C. C. 282, where the study period was eight weeks at Boston on the terminals of the New Haven and of the Boston and Maine Railroads. Bearing in mind that the test period there was eight times as long as that in the instant case, we quote from the decision cited: (page 298-9)

> "but it is obviously dangerous to predicate conclusions upon a short test period which may or may not reflect average conditions. Conditions in switching yards change continually and economy of operation necessitates increase or reduction of the switching force from time to time, with re-alignment of the work in each case. The inter-relation of line-haul and switching traffic at Boston is such that it is exceedingly difficult, if it is possible at all, to segregate properly the expense of handling purely switching movements from the expense of switching through line-haul cars. *Switching costs can probably be ascertained with approximate accuracy only through a system of accounts designed for the purpose and maintained over a considerable period of time.*" (Italics our own.)

Manifestly a cost study for a single week, staggered over a five months' period by these fifteen carriers, in 1927, can afford no basis for a finding as to the relative cost of handling intrastate and interstate traffic in 1932.

(c) The assignment of elements of service to each route was not based on any test of actual movement.

The record shows that elements of service on the fifteen roads were assigned to each route based upon the knowledge and experience of operating representatives of each road as to how the cars moved. Actual movements of cars were not traced except for about 200 cars.

The record is replete with showings of errors made by the operating representatives of the carriers in assigning elements of service and resulting elements of cost. This subject is one of the most important phases of the cost study work. There should have been a tracing of the movements of cars showing the actual transfer elements on each car. Only in this way can elements of cost be accurately determined for any particular car. To permit the respondents to compute costs for each movement of cars, and then to permit an operating man to sit down in his office and guess that the cars must have moved under assigned elements of service, is to put a premium upon error, and where, as in this case

the entire reliance of the carriers was upon the result of the cost study, it presents a wholly unreliable record as to costs; and your honorable Commission cannot afford to assert its power under the Thirteenth Section of the Interstate Commerce Act to over-ride and nullify the decision of the lawfully constituted regulatory body of the State of Illinois by setting aside its judgment upon the same subject matter when the record presented is so defective as a basis for determining costs. It should be borne in mind that during the month of September, 1926, the record indicates that 53.3% of the total traffic involved was Illinois intrastate traffic; while the interstate movement represented but 40.3%.

(d) The Saur-Coverston formula, as applied for the determination of switching costs is defective, particularly as used in the determination of engine-hour and car-detention costs.

The Saur-Coverston formula has been presented to your Commission in a number of cases. Its fundamental principle is the time feature. Allocated charges for each general group, except for clerical and car-detention costs, are associated with the engine-hour. The engine-hour as used in this case represents a composite of many circumstances, not all of which are present at a given

time, nor in like proportions in connection with specified elements of services involved in handling traffic and in performing services incidental thereto. The average cost per engine-hour as shown by Exhibit No. 2, varied from $8.76 in the case of the Chicago, Burlington & Quincy "other than general switching," to $33.33, for the Indiana Harbor Belt in operating the Gibson-Hump. The average engine-hour cost for the cost study roads is shown as $14.58.

The output per engine-hour—that is, the number of cars handled in classification service, transfer service, interchange service, weighing service, team-track service, and cars handled at the freight houses, varied widely. From a study of these figures the conclusion must be reached that the present record is defective in determining engine-hour costs.

The item of car-detention is one of the most important elements in this case as it constitutes a large percentage of the alleged cost of switching cars within the Chicago District. There is no showing that individual classes of freight train cars are the same for each of the carriers who participated in the cost study, and no showing that the cars used in handling of shipments from point to point within the district are of like kind and were used in exact proportion to the kind of cars

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used by the nine roads embraced in the study. There is no showing that the cost of repairs to individual classes of freight train cars were the same for varying forms of construction and there is no showing that the proportion of cars in use were such as to give due weight to charges for repairs, depreciation, et cetera, as between individual carriers. The cost of repairs is not necessarily the result of the length of time the car spends in the terminal but of the damage done while being switched, and ordinarily the principal damage to a car in the terminal is in classification service. No cost study on this subject can be satisfactory, unless it recognizes the various classes of car repairs and it must consider time in service, mileage run, and damage to cars in switching based upon the experience of the switching roads.

Engine-hour costs are an accumulation of costs, including among other things, track maintenance, and when, as under the Saur-Covertson formula, as has been done in this case, time is computed on industry tracks where the carrier has no investment and no track maintenance, there is charged against the switching service an element of cost which is not borne by the carrier. By segregating the time of the engine while on the industry-owned tracks, the carrier can eliminate the excessive cost contained in the engine-hour costs, and the

overhead applied thereto in the use of the operating ratio.

Many other errors in the Saur-Covertson formula as applied in this case were adverted to in the record. In whatever further cost study is had in this case data should be accumulated from which the Commission can determine what is the proper engine-hour and car-detention costs, as well as other items embraced within the formula.

(e) The application of costs determined during varying periods of a single week in 1927 to the movement of cars disclosed in the traffic test for the month of September, 1926, is not a proper method for determining representative costs for switching in the Chicago District.

The lack of representative character in the cost study due to the inclusion of only fifteen of the thirty-five railroads within the District, and to a varying single week on the individual fifteen lines clearly shows the unfairness of the cost study; but that unfairness is emphasized when the cost study of a single week in one year is applied to a traffic test for a month in another year. Not a single week in September was embraced in the cost study; the varying costs ascertained for single weeks

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in other months of another year were applied against the traffic during the entire month of September, 1926. Whether the traffic test in September, 1926, is representative of the average movement throughout a period of years is not disclosed by the record. In any event, the cost study should be applied against a current traffic test.

(f) The testimony as to cost relates wholly to a period not later than October 25, 1927, and the hearing was concluded on September 21, 1928.

Attention is again directed to the fact that all of the testimony introduced in this proceeding as to cost, relates wholly to a period not later than October 25, 1927, and the hearing was concluded on September 21, 1928.

It would thus appear that your Commission is asked by the respondent carriers to require increases in intrastate switching rates within the State of Illinois based largely upon evidence of cost relating to a period over four years ago.

Your honorable Commission, in many cases, and the Supreme Court in its decisions, has recognized need for careful and thorough consideration of all the facts in cases involving the exercise by your Commission of the

authority granted by Section 13 of the Interstate Commerce Act.

The present case was reopened by your Commission solely upon the question of whether the relation of the rates and charges for switching in intrastate commerce to the rates prescribed for like switching in interstate commerce, is in violation of Section 13 of the Interstate Commerce Act. The Illinois Commerce Commission in Docket 17250—*In the Matter of the Proposed Changes in Rates for the Transportation of Carload Freight Between Points in the Chicago Switching District and also Between Points in the Chicago Switching District and Points Outside of the Said District Resulting in Advances and Reductions Stated in Schedules Filed by the Atchison, Topeka and Santa Fe Railway Company et al.,* —has specifically found upon the same evidence now of record in this proceeding, the hearing being held jointly with your Commission, that the cost study did not warrant any increase in the rates in effect on Illinois intrastate traffic in the Chicago Switching District.

The decision of the Illinois Commission, within which state the record shows that 53.3% of the total traffic moved, pointed out, among other things, that the cost study was not representative in character as to carriers and as to the time embraced in the study. Only by a new

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and thorough cost study can the record be made complete and sufficient for the exercise of the important power which your Commission possesses. All of the circumstances connected with this case require a new and thorough cost study in order that your Commission can have before it all of the facts before asserting its power to over-ride and nullify the decision of the Illinois Commerce Commission which is the lawfully constituted regulatory body of the State of Illinois.

Wherefore we respectfully move the Commission to require the respondents herein to conduct a cost study under the supervision of the Commission with full rights to representatives of all parties to participate therein,

(a) for a representative period of one month, or whatever period the Commission may regard as proper;

(b) by each and every carrier within the Chicago Switching District;

(c) the cost to be separately ascertained for Indiana intrastate movements, Illinois intrastate movements and interstate switching district movements for each of the following four switching movements:

1. switching as an extension of a line-haul movement on which the switching cost is absorbed.

2. switching of line-haul traffic by an intermediate carrier whose switching charge is absorbed out of the line-haul rate,

3. switching wholly confined to the switching district,

4. switching movement by the road-haul carrier in connection with road-haul movement;

(d) A statement of revenues of study carriers shown separately for each class shown in previous paragraphs as to costs, except the revenue of the road-haul carrier for its own switching in connection with road-haul traffic, covered by Paragraph (c), No. 4.

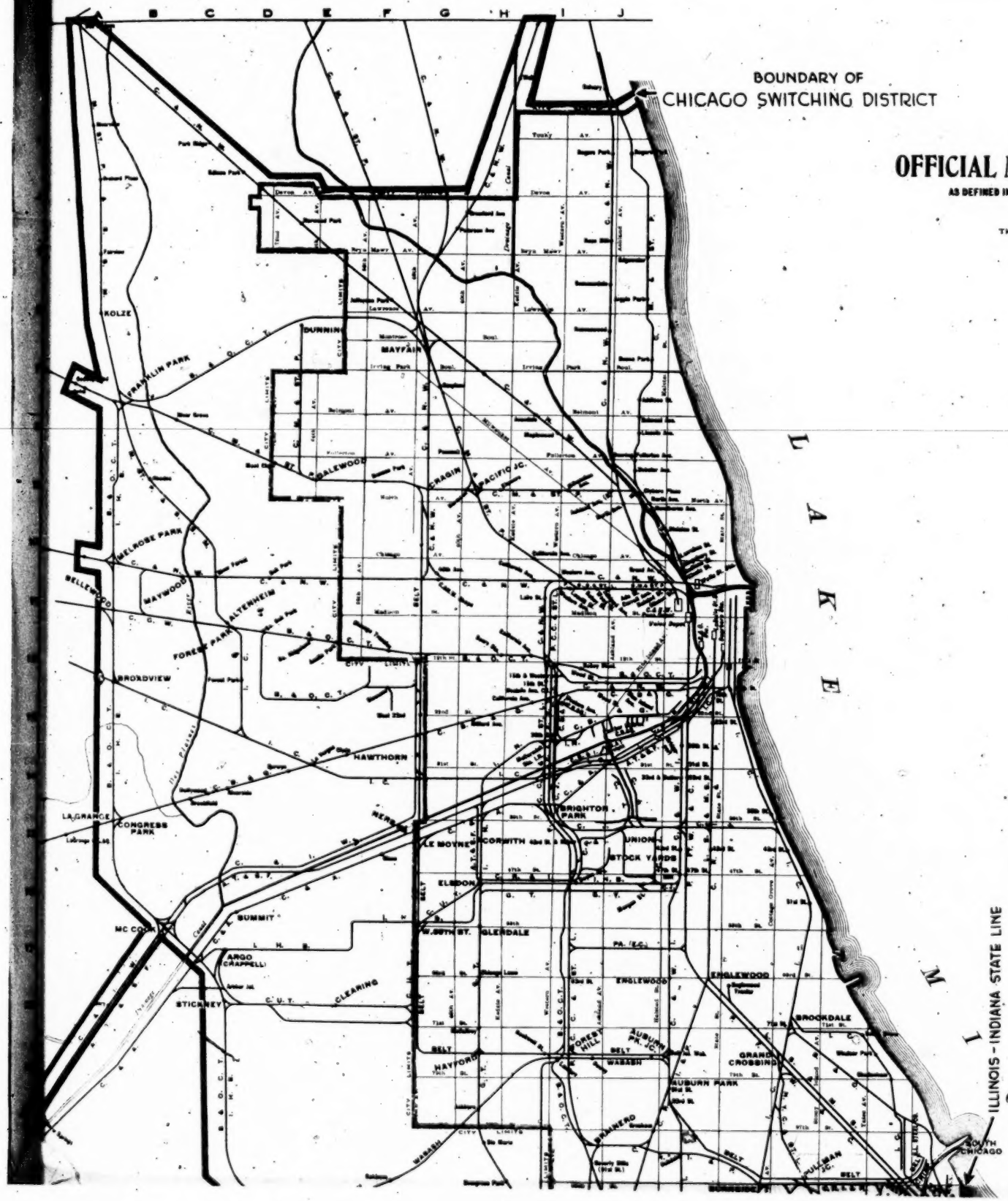
(e) Both the costs under paragraph (c) and the revenues under paragraph (d) to be classified according to commodity descriptions followed in the previous cost study revenues to be set forth both on the basis of the rates in effect December 9 and those in effect on December 10, 1931.

(f) Statistical data such as prepared in the previous cost study as to average haul, one-line, two-line, three-line, average loading, average revenue, et cetera, to be computed.

Dated at Springfield, Illinois, February 3rd, 1932.

G. GALE GILBERT, Chairman,
J. PAUL KUHN,
WALTER H. WILSON,
WILLIAM M. BRINKMAN,
PHIL W. COLLINS,
PAUL SAMUELL,
Commissioners.

Centennial Annex Building
Springfield, Illinois


A B C D E F G H I J
BOUNDARY OF
CHICAGO SWITCHING DISTRICT
OFFICIAL MAP OF CHICAGO DISTRICT
AS DEFINED IN L. A. LOWREY'S TARIFF'S NOS. 20, 21, 22 AND 24 SERIES
ISSUED UNDER THE SUPERVISION OF
THE STANDING SWITCHING COMMITTEE
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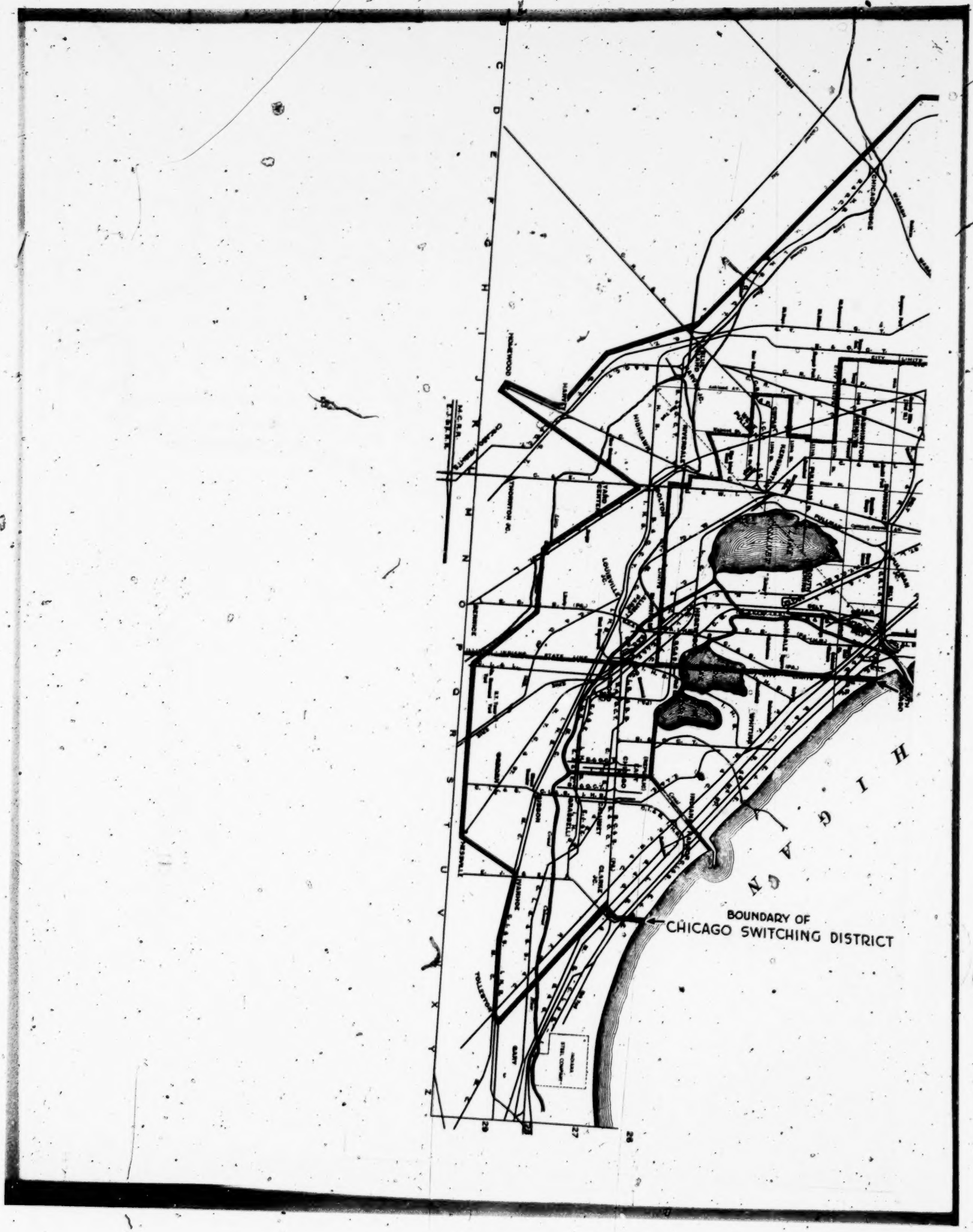
L A K E M I C H I G A N
ILLINOIS - INDIANA STATE LINE
SOUTH CHICAGO
KOLZE
DUNNING
MAYFAIR
FRANKLIN PARK
LOGAN
GALEWOOD
MELROSE PARK
MAYWOOD
BELLWOOD
ALTENHEIM
FOREST PARK
BROADVIEW
HAWTHORN
LA GRANGE
CONGRESS PARK
BRIGHTON PARK
LE MOYNE
CORWITH
UNION STOCK YARDS
ELSDON
SUMMIT
MC COOK
ARGO CHAPPELL
STICKNEY
CLEARING
W. 59TH ST.
GLENDALE
ENGLEWOOD
BROCKDALE
GRAND CROSSING
AUBURN PARK
HAYFORD
WARREN
PACIFIC JC.
CRAGIN

STRICT


BOUNDARY OF
CHICAGO SWITCHING DISTRICT